IN THE SUPREME COURT OF THE STATE OF ALASKA

GOLDEN HEART UTILITIES, INC. and COLLEGE UTILITIES CORPORATION, Appellants, v. REGULATORY COMMISSION OF ALASKA; OFFICE OF THE ATTORNEY GENERAL REGULATORY AFFAIRS & PUBLIC ADVOCACY SECTION; FOUNTAINHEAD DEVELOPMENT, INC.; GREATER FAIRBANKS COMMUNITY HOSPITAL FOUNDATION, INC.; FOUNDATION HEALTH, LLC; JL PROPERTIES, INC.; TIMMONS & LARSON, INC.; MV INVESTMENTS LLC; ALASKA EXPRESSO DISTRIBUTORS LLC, D/B/A SUNRISE BAGEL & ESPRESSO; PACIFIC RIM ASSOCIATES I, INC., D/B/A CLARION HOTEL & SUITES; H2O 2U LLC D/B/A WATER WAGON; and UNIVERSITY OF ALASKA FAIRBANKS, Appellees.	)	Supreme Court No. S-18624

Trial Court Case # 3AN-21-06152CI
Regulatory Commission of Alaska Dockets U-19-070/U-19-071/U-19-087/U-19-088

APPELLANTS' OPENING BRIEF

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Filed in the Supreme Court of the State of Alaska on this ____ day of July, 2023.

_____
Clerk of the Court

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UNITED STATES CONSTITUTION

United States Constitution, Fifth Amendment
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment, Section 1
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA CONSTITUTION

Alaska Constitution, Article I, § 18 Eminent Domain
Private property shall not be taken or damaged for public use without just compensation.

ALASKA STATUTES

AS 22.10.020(d). Jurisdiction of the superior court.
(d) The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law, and has jurisdiction over petitions for relief in administrative matters under AS 44.62.305. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency, except an appeal under AS 43.05.242, shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part. The hearings on appeal from a final order or judgment under AS 43.05.242 shall be on the record.

AS 42.05.175(c). Timelines for issuance of final orders.
(c) Notwithstanding a suspension ordered under AS 42.05.421, the commission shall issue a final order not later than 450 days after a complete tariff filing is made for a tariff filing that changes the utility's revenue requirement or rate design.

AS 42.05.191. Contents and service of orders.
Every formal order of the commission shall be based upon the facts of record. However, the commission may, without a hearing, issue an order approving any settlement supported by all the parties of record in a proceeding, including a compromise settlement. Every order entered pursuant to a hearing must state the commission's findings, the basis of its findings and conclusions, together with its decision. These orders shall be entered of record and a copy of them shall be served on all parties of record in the proceeding.

AS 42.05.241. Conditions of issuance.
A certificate may not be issued unless the commission finds that the applicant is fit, willing, and able to provide the utility services applied for and that the services are required for the convenience and necessity of the public. The commission may issue a certificate granting an application in whole or in part and attach to the grant of it the terms and conditions it considers necessary to protect and promote the public interest including the condition that the applicant may or shall serve an area or provide a necessary service not contemplated by the applicant. The commission may, for good cause, deny an application with or without prejudice.

AS 42.05.301. Discrimination in service.
Except as provided in AS 42.05.306, a public utility may not, as to service, make or grant an unreasonable preference or advantage to any person or subject any person to an unreasonable prejudice or disadvantage. A public utility may not establish or maintain or provide an unreasonable difference as to service, either as between localities or as between classes of service, but nothing in this section prohibits the establishment of reasonable classifications of service or requires unreasonable investment in facilities.

AS 42.05.361(a). Tariffs, contracts, filing, and public inspection.
(a) Under regulations the commission shall adopt, every public utility shall file with the commission, within the time and in the form the commission designates, its complete tariff showing all rates, including joint rates, tolls, rentals, and charges collected and all classifications, rules, regulations, and terms and conditions under which it furnishes its services and facilities to the general public, or to a regulated or municipally owned utility for resale to the public, together with a copy of every special contract with customers which in any way affects or relates to the serving utility's rates, tolls, charges, rentals, classifications, services, or facilities. The public utility shall clearly print, or type, its complete tariff and keep an up-to-date copy of it on file at its principal business office and at a designated place in each community served. The tariffs shall be made available to, and subject to inspection by, the general public on demand.

AS 42.05.381. Rates to be just and reasonable.
(a) All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished shall be just and reasonable; however, a

rate may not include an allowance for costs of political contributions, or public relations except for reasonable amounts spent for

(1) energy conservation efforts;

(2) public information designed to promote more efficient use of the utility's facilities or services or to protect the physical plant of the utility;

(3) informing shareholders and members of a cooperative of meetings of the utility and encouraging attendance; or

(4) emergency situations to the extent and under the circumstances authorized by the commission for good cause shown.

(b) In establishing the revenue requirements of a municipally owned and operated utility the municipality is entitled to include a reasonable rate of return.

(c) A utility, whether subject to regulation by the commission or exempt from regulation, may not charge a fee for connection to, disconnection from, or transfer of services in an amount in excess of the actual cost to the utility of performing the service plus a profit at a reasonable percentage of that cost not to exceed the percentage established by the commission by regulation.

(d) A utility shall provide for a reduced fee or surcharge for standby water for fire protection systems approved under AS 18.70.081 which use hydraulic sprinklers.

(e) The commission shall adopt regulations for electric cooperatives and for local exchange telephone utilities setting a range for adjustment of rates by a simplified rate filing procedure. A cooperative or telephone utility may apply for permission to adjust its rates over a period of time under the simplified rate filing procedure regulations. The commission shall grant the application if the cooperative or telephone utility satisfies the requirements of the regulations. The commission may review implementation of the simplified rate filing procedure at reasonable intervals and may revoke permission to use the procedure or require modification of the rates to correct an error.

(f) A local exchange telephone utility may adjust its rates in conformance with changes in jurisdictional cost allocation factors required by either the Federal Communications Commission or the Regulatory Commission of Alaska upon a showing to the Regulatory Commission of Alaska of

(1) the order requiring the change in allocation factors;

(2) the aggregate shift in revenue requirement, segregated by service classes or categories, caused by the change in allocation factors; and

(3) the rate adjustment required to conform to the required shift in local revenue requirement.

(g) The commission shall allow, as a necessary and reasonable expense, all payments made to the Department of Environmental Conservation under AS 46.14.240 — 46.14.250. The commission shall allow the public utility to recover these fees through a periodic fuel surcharge rate adjustment.

(h) An electric or telephone utility that has overhead utility distribution lines and that provides services in a municipality with a population of more than 200,000 must spend at least one percent of the utility's annual gross revenue from retail customers in that municipality to place existing overhead utility distribution lines in that municipality underground. In determining the annual gross revenue under this subsection, only revenue derived from the utility's distribution lines in the municipality shall be considered.

(i) An electric or telephone utility that is implementing a program to place existing overhead utility distribution lines located in a municipality underground may amend its rates for services provided to customers in the municipality to enable the utility to recover the full actual cost of placing the lines underground. Notwithstanding AS 42.05.411 — 42.05.431, an amendment to a utility's rates under this subsection is not subject to commission review or approval. A utility amending its rates under this subsection shall notify the commission of the amendment. This subsection applies to an undergrounding program to the extent that the costs do not exceed two percent of the utility's annual gross revenue. If an undergrounding program's costs exceed two percent, the commission may regulate rate increases proposed for the recovery of the amount above two percent.

(j) When an electric utility or a telephone utility is implementing a program to place existing overhead utility distribution lines located in a municipality underground, any other overhead line or cable in the same location shall be placed underground at the same time. Each entity whose lines or cables are placed underground shall pay the cost of placing its own lines or cables underground.

(k) The cost to the utility of storing gas in a gas storage facility or storing liquefied natural gas in a liquefied natural gas storage facility that is allowed in determining a just and reasonable rate shall reflect the reduction in cost attributable to any exemption from a payment due under AS 38.05.096 or 38.05.180(u), as applicable, and the value of a tax credit that the owner of the gas storage facility received under AS 43.20.046 or 43.20.047, as applicable. The commission may request the (1) commissioner of natural resources to report the value of the exemption from a payment due under AS 38.05.096 or 38.05.180(u), as applicable, that the gas storage facility received; and (2) commissioner of revenue to

report information on the amount of tax credits claimed under AS 43.20.046 and 43.20.047, as applicable, for the gas storage facility or liquefied natural gas storage facility. In this subsection, "gas storage facility" has the meaning given in AS 31.05.032.

(l) The rates and terms and conditions of service of an incumbent local exchange carrier for basic residential local telephone service must be uniform within the carrier's study area, as determined by the Federal Communications Commission.

(m) The rates and terms and conditions of service of a competitive local exchange carrier for basic residential local telephone service must be uniform throughout the carrier's service area.

(n) The retail rates of a long distance telephone company for message telephone service for residential customers must be geographically averaged. If rates vary by distance over which calls are placed, the rate for each mileage band must be equal to or greater than the rate for the next shorter mileage band.

(o) In this section, "local exchange carrier" and "long distance telephone company" have the meanings given in AS 42.05.890.

AS 42.05.391. Discrimination in rates.

(a) Except as provided in AS 42.05.306, a public utility may not, as to rates, grant an unreasonable preference or advantage to any of its customers or subject a customer to an unreasonable prejudice or disadvantage. A public utility may not establish or maintain an unreasonable difference as to rates, either as between localities or between classes of service. A municipally owned utility may offer uniform or identical rates for a public utility service to customers located in different areas within its certificated service area who receive the same class of service. Any uniform or identical rate shall, upon complaint, be subject to review by the commission and may be set aside if shown to be unreasonable.

(b) A rate charged by a municipality for a public utility service furnished beyond its corporate limits is not considered unjustly discriminatory solely because a different rate is charged for a similar service within its corporate limits.

(c) A public utility may not directly or indirectly refund, rebate or remit in any manner, or by any device, any portion of the rates and charges or charge, demand, or receive a greater or lesser compensation for its services than is specified in its effective tariff. A public utility may not extend to any customer any form of contract, agreement, inducement, privilege, or facility, or apply any rule, regulation, or condition of service except such as are extended or applied to all customers under like circumstances. A public utility may not offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of utility service unless it conforms to a tariff approved by the commission, and the compensation, consideration, or equipment is offered to all

persons in the same classification using or applying for the public utility service; in determining the reasonableness of such a tariff filed by a public utility the commission shall consider, among other things, evidence of consideration or compensation paid by a competitor, regulated or nonregulated, of the public utility to secure the installation or adoption of the use of the competitor's service.

(d) Nothing in this section prevents a public utility from charging reduced rates to customers transferred to it from a competing utility provided the reduction is an integral part of a contract, arrangement, or plan to eliminate the overlapping of service areas or to minimize duplication of facilities and competition between public utilities.

AS 42.05.421. Suspension of tariff filing.

(a) When a tariff filing is made containing a new or revised rate, classification, rule, regulation, practice, or condition of service the commission may, either upon written complaint or upon its own motion, after reasonable notice, conduct a hearing to determine the reasonableness and propriety of the filing. Pending the hearing the commission may, by order stating the reasons for its action, suspend the operation of the tariff filing. For a tariff filing that does not change the utility's revenue requirement or rate design, the suspension may last for a period not longer than six months beyond the effective date established in the tariff filing unless the commission extends the period for good cause. For a tariff filing that changes the utility's revenue requirement or rate design, the suspension may last, unless the commission extends the period for good cause, for a period not longer than

(1) six months before an interim rate equal to the requested rate goes into effect and not longer than 12 months before a permanent rate goes into effect if the annual gross revenues of the utility making the filing are more than $3,000,000; and

(2) 150 days before an interim rate equal to the requested new rate goes into effect and not longer than one year before a permanent rate goes into effect if the annual gross revenues of the utility making the filing are $3,000,000 or less.

(b) An order suspending a tariff filing may be vacated if, after investigation, the commission finds that it is in all respects proper. Otherwise the commission shall hold a hearing on the suspended filing and issue its order, before the end of the suspension period, granting, denying or modifying the suspended tariff in whole or in part.

(c) In the case of a proposed increased rate, the commission may by order require the interested public utility or utilities to place in escrow in a financial institution approved by the commission and keep accurate account of all amounts received by reason of the increase, specifying by whom and in whose behalf the amounts are paid. Upon completion of the hearing and decision the commission may by order require the public utility to refund to the persons in whose behalf the amounts were paid, that portion of the increased rates

which was found to be unreasonable or unlawful. Funds may not be released from escrow without the commission's prior written consent and the escrow agent shall be so instructed by the utility, in writing, with a copy to the commission. The utility may, at its expense, substitute a bond in lieu of the escrow requirement.

(d) One who initiates a change in existing tariffs shall bear the burden to prove the reasonableness of the change.

AS 42.05.431(a) Power of commission to fix rates.
(a) When the commission, after an investigation and hearing, finds that a rate demanded, observed, charged, or collected by a public utility for a service subject to the jurisdiction of the commission, or that a classification, rule, regulation, practice, or contract affecting the rate, is unjust, unreasonable, unduly discriminatory or preferential, the commission shall determine a just and reasonable rate, classification, rule, regulation, practice, or contract to be observed or allowed and shall establish it by order. A municipality may covenant with bond purchasers regarding rates of a municipally owned utility, and the covenant is valid and enforceable and is considered to be a contract with the holders from time to time of the bonds. The financial covenants contained in mortgages and other debt instruments of cooperative utilities organized under AS 10.25 are also valid and enforceable, and rates set by the commission must be adequate to meet those covenants. However, a cooperative utility that is negotiating to enter a mortgage or other debt instrument that provides for a times-interest-earned ratio (TIER) greater than the ratio the commission most recently approved for that cooperative shall submit the mortgage or debt instrument to the commission before the instrument takes effect. The commission may disapprove the instrument within 60 days after its submission. If the commission has not acted within 60 days, the instrument is considered to be approved.

AS 42.05.441(b) Valuation of property of a public utility.
(b) In determining the value for rate-making purposes of public utility property used and useful in rendering service to the public, the commission shall be guided by acquisition cost or, if lower, the original cost of the property to the person first devoting it to public service, less accrued depreciation, plus materials and supplies and a reasonable allowance for cash working capital when required.

AS 42.05.551(a). Review and enforcement.
(a) All final orders of the commission are subject to judicial review in accordance with AS 44.62.560 — 44.62.570.

AS 44.62.560. Judicial review.
(a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served

on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes

(1) the pleadings;

(2) all notices and orders issued by the agency;

(3) the proposed decision by a hearing officer;

(4) the final decision;

(5) a transcript of all testimony and proceedings;

(6) the exhibits admitted or rejected;

(7) the written evidence; and

(8) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeals in civil matters shall be followed where this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

AS 44.62.570. Scope of review.
(a) An appeal shall be heard by the superior court sitting without a jury.

(b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established

if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by

(1) the weight of the evidence; or

(2) substantial evidence in the light of the whole record.

(d) The court may augment the agency record in whole or in part, or hold a hearing de novo. If the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing, the court may

(1) enter judgment as provided in (e) of this section and remand the case to be reconsidered in the light of that evidence; or

(2) admit the evidence at the appellate hearing without remanding the case.

(e) The court shall enter judgment setting aside, modifying, remanding, or affirming the order or decision, without limiting or controlling in any way the discretion legally vested in the agency.

(f) The court in which proceedings under this section are started may stay the operation of the administrative order or decision until

(1) the court enters judgment;

(2) a notice of further appeal from the judgment is filed; or

(3) the time for filing the notice of appeal expires.

(g) A stay may not be imposed or continued if the court is satisfied that it is against the public interest.

(h) If further appeal is taken, the supreme court may, in its discretion, stay the superior court judgment or agency order.

(i) If a final administrative order or decision is the subject of a proceeding under this section, and the appeal is filed while the penalty imposed is in effect, finishing or

complying with the penalty imposed by the administrative agency during the pendency of the proceeding does not make the determination moot.

AS 44.62.640(a)(3) Definitions for AS 44.62.010 — 44.62.630.
(a) In AS 44.62.010 — 44.62.319, unless the context otherwise requires,

(3) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation on a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

AS 45.45.010. Legal rate of interest; prepayment of interest.
(a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

(b) Interest may not be charged by express agreement of the parties in a contract or loan commitment that is more than the greater of 10 percent or five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made. A contract or loan commitment in which the principal amount exceeds $25,000 is exempt from the limitation of this subsection.

(c) [Repealed, § 3 ch 84 SLA 1973.]

(d) [Repealed, § 2 ch 94 SLA 1981.]

(e) [Repealed, § 4 ch 146 SLA 1974.]

(f) A bank, credit union, savings and loan institution, pension fund, insurance company, or mortgage company may not require or accept any percent of ownership or profits above its interest rate. This subsection does not apply to a loan if the principal amount of the loan is $1,000,000 or more and the term of the loan is five years or more, or to a negatively

amortizing loan secured by owner-occupied real property originated under a program approved or sponsored by

(1) the federal government, including congressionally chartered national corporations; or

(2) the state if

(A) the real property that secures the loan is not subject to forced sale provided the owner has not violated the terms of the loan agreement including terms regarding

(i) payment of property taxes;

(ii) payment of hazard or fire insurance premiums;

(iii) keeping the property in reasonable repair;

(iv) not vacating the property for a period longer than 12 months;

(B) the owner may not be evicted from the real property that secures the loan unless a term of the loan agreement regarding a matter listed in (A)(i) — (iv) of this paragraph has been violated;

(C) neither the estate nor any heir of the former owner may be compelled to pay a deficiency judgment related to the loan; and

(D) the estate or an heir of the former owner has a right of first refusal and may either pay off the loan balance in full, if the former owner had equity in the property, or pay a sum not to exceed 95 percent of the value of the property at the time of exercise of the right of first refusal as determined by an independent real estate appraiser licensed under AS 08.87.

(g) Loan contracts and commitments covering one- to four-family dwellings may be prepaid without penalty, except federally insured loans that require a prepayment penalty.

(h) If the limitations on interest rates provided for in this section are inconsistent with the provisions of any other statute covering maximum interest, service charges, or discount rates, then the provisions of the other statute prevail.

ALASKA REGULATIONS

3 AAC 48.320(a)-(b) Separate tariff for each utility or pipeline carrier and controlling effective tariff

(a) When a single entity furnishes more than one kind of utility service, pipeline carrier service, or commodity, as defined in AS 42.05 or AS 42.06, the entity shall file a separate tariff for each kind of utility service, pipeline carrier service, or commodity that the entity furnishes.

(b) For every service that a utility or pipeline carrier offers that is regulated by the commission, the effective tariff of the utility or pipeline carrier must set out the rates, charges, regulations, terms, and conditions applicable to the service. The effective tariff of every utility or pipeline carrier must specifically provide for, and authorize, every rate or charge subject to the commission's jurisdiction.

3 AAC 52.501. Application and waiver

(a) Each electric utility subject to the regulatory jurisdiction of the commission must comply with the provisions of 3 AAC 52.501 - 3 AAC 52.504 and 3 AAC 52.507 - 3 AAC 52.519.

(b) Each gas utility subject to the regulatory jurisdiction of the commission must comply with the provisions of 3 AAC 52.501 - 3 AAC 52.502 and 3 AAC 52.505 - 3 AAC 52.519.

(c) Unless otherwise required under AS 42.05, a requirement in 3 AAC 52.501 - 3 AAC 52.519 may be modified or waived, in whole or in part, by order of the commission, on the commission's own motion or on a showing that the waiver or modification is in the public interest. A utility shall file and the commission will consider an application for waiver in accordance with 3 AAC 48.805.

ALASKA APPELLATE RULES

Appellate Rule 601. Scope of Part Six.

(a) Part Six of these rules (Rules 601 through 612) applies to requests to the superior court to review decisions of the district court or an administrative agency under AS 22.10.020(d) and AS 22.15.240(a), either by appeal or by petition for review.

(b) An appeal may be taken to the superior court from a final judgment entered by the district court, in the circumstances specified in AS 22.15.240, or from a final decision of an administrative agency, except that appeals from decisions of the Alaska Workers' Compensation Appeals Commission shall be taken to the supreme court under AS 23.30.129 and are governed by parts Two and Five of these rules.

(c) On any point not addressed in Part Six, procedure in appeals to the superior court shall be governed by the provisions of Parts Two and Five of these rules, and procedure in petitions for review and petitions for judicial relief in administrative matters under AS 44.62.305 to the superior court shall be governed by the provisions of Part Four of these rules.

TABLE OF ACRONYMS AND ABBREVIATIONS

AECA	Alaska Exchange Carriers Association, Inc.
AELP	Alaska Electric Light and Power Company
APUC	Alaska Public Utilities Commission
ASW	American States Water
AWWU	Anchorage Waste Water Utilities
CAPM	Capital Asset Pricing Model
CE	Comparable Earnings
CINGSA	Cook Inlet Natural Gas Storage Alaska
COE	Cost of Energy
Commission	Regulatory Commission of Alaska
COPA	Cost of Power Adjustment
COSS	Cost of Service and Rate Design Study
CUC	College Utilities Corporation
DCF	Discounted Cash Flow
EADIT	Excess Accumulated Deferred Income Taxes
EPS	Earnings Per Share
FERC	Federal Energy Regulatory Commission
FWW	Fort Wainright
GHU	Golden Heart Utilities, Inc.
LED	Light Emitting Diode
M/B	Market to Book
NARUC	National Association of Regulatory Utility Commissioners
Order 1	U-19-070(1)/U-19-071(1)
Order 4	U-19-070(4)/U-19-071(4)/U-19-087(1)/U-19-088(1)
Order 21	U-19-070(21)/U-19-071(21)/U-19-087(18)/U-19-088(18)
Order 26	U-19-070(26)/U-19-071(26)/U-19-087(23)/U-19-088(23)
PSC	Montana Public Service Commission
RAPA	Regulatory Affairs Public Advocacy Section
RCA	Regulatory Commission of Alaska
ROE	Return on Equity
TCJA	Tax Cut and Jobs Act
UAF	University of Alaska, Fairbanks

The Appellants Golden Heart Utilities, Inc. ("GHU") and College Utilities Corporation ("CUC"), hereafter referred to as GHU/CUC, appeal the Superior Court's decision in Case No. 3AN-21-06152CI to uphold various orders of the Regulatory Commission of Alaska ("Commission" or "RCA") issued in GHU/CUC's four consolidated test year 2018 rate cases in Dockets U-19-070/U-19-071/U-19-087/U-19-088.

GHU/CUC are economically regulated by the RCA. As a regulated public utility, GHU/CUC have a statutory obligation to provide safe and reliable water and wastewater utility services. The RCA is responsible for setting just and reasonable rates for the water and wastewater service GHU/CUC provides to its customers.

JURISDICTIONAL STATEMENT

On January 19, 2021, the RCA entered its final order in GHU/CUC's general rate cases, consolidated Dockets U-19-070/U-19-071/U-19-087/U-19-088.[1] That order was subject to appeal as the final decision in those dockets.[2] On April 30, 2021, the RCA entered an order granting in part GHU/CUC's petition for partial reconsideration.[3] That order was subject to appeal as a final order in those dockets.[4] On December 21, 2022, the Superior Court issued an order affirming the RCA's decisions in Orders 1, 21, and 26 on

[1] Order No. U-19-070(21)/U-19-071(21)/U-19-087(18)/U-19-088(18) (Jan. 19, 2021) ("Order 21") [Exc. 0784 to 0849; R. 037964 to 038029].
[2] Order 21 at 65 [Exc. 0848; R. 038028].
[3] Order No. U-19-070(26)/U-19-071(26)/U-19-087(23)/U-19-088(23) (April 30, 2021) ("Order 26") [Exc. 0876 to 0889; R. 038030 to 038043].
[4] Order 26 at 13 [Exc. 0888; R. 038042].

all issues appealed.[5] GHU/CUC filed a timely Notice of Appeal.[6] This Court has jurisdiction over the appeal.[7]

ISSUES PRESENTED FOR REVIEW

Issue 1: Did the RCA lack a reasonable basis, improperly deviate from precedent, or apply an improper standard of proof in its decisions regarding allowed returns on equity?

Issue 2: Did the RCA lack a reasonable basis or improperly deviate from precedent in its decisions to exclude plant additions in rate base, in particular additions for the Chena Marina Extension, screening system, and sewer treatment plant clarifier and influent pump, individually or collectively?

Issue 3: Did the RCA lack a reasonable basis, improperly deviate from precedent, or apply an improper standard of proof in denying Appellants' request for a consumption adjustment to account for projected declining consumption during the rate years?

Issue 4: Did the RCA lack a reasonable basis, improperly disregard a prior Superior Court order, or fail to adequately state its findings or the bases therefore in its decision to require Appellants to either place revenue received from interim rate increases into escrow or pay interest at 10.5 percent on refunds?

STATEMENT OF THE CASE

This case is about a request by GHU/CUC for interim and final rate increases for

[5] Order on Administrative Appeal, Case No. 3AN-21-06152CI (Dec. 21, 2022) [Exc. 0893 to 0912; R. 037923 to 037942].
[6] GHU/CUC's Notice of Appeal (Jan. 19, 2023).
[7] AS 22.10.020(d), AS 42.05.551(a), AS 44.62.560 and .570, Appellate Rule 201.

water and wastewater services. Appellants request that this Court reverse and remand various decisions of the RCA in Order Nos. 1,[8] 21, and 26, that affect (1) GHU/CUC's allowed return on equity; (2) what GHU/CUC can include in rate base; (3) what expenses GHU/CUC are able to recover through rates; (4) GHU/CUC's annual revenue requirement; and (5) the choice between escrow or repayment at 10.5 percent interest that the RCA imposed on any refund obligations that may result if the revenue requirement under interim rates exceeds the revenue requirement under permanent rates.

To provide a framework for evaluating this appeal, Section A of this Statement of the Case discusses the constitutional and statutory prohibitions against confiscatory rates. Section B provides an overview of the RCA's ratemaking process relevant to this appeal. Section C discusses the legal basis and criteria for the RCA to grant interim and refundable rate increases while evaluating a utility's request for revised permanent rates. Finally, Section D describes the relevant aspects of the proceedings and RCA decisions leading up to this appeal.

A. THE RCA IS REQUIRED TO SET RATES THAT ARE NOT UNCONSTITUTIONALLY CONFISCATORY OR STATUTORILY UNREASONABLE.

Alaska Statute 42.05.381 requires that the RCA set rates that are "just and reasonable." The Takings Clause of the Fifth Amendment to the United States

[8] Order No. U-19-070(1)/ U-19-071(1) (Jul. 15, 2019) ("Order 1") [Exc. 0256 to 0264; R. 017526 to 017534].

Constitution,[9] applicable to the states through the Fourteenth Amendment,[10] and the Takings Clause of the Alaska Constitution[11] prohibit "confiscation"—when the government takes private property for public use without just compensation.

In the context of public utility regulation, the United States Supreme Court in *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia* ("*Bluefield*")[12] established that "unjust, unreasonable, and confiscatory" rates are "those which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service."[13] The enforcement of such rates "deprives the public utility company of its property in violation of the Fourteenth Amendment" and is "beyond the legislative power" of the regulator.[14] The *Bluefield* court noted that the prohibition against unconstitutionally confiscatory rates "is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary" and cited *Smyth v. Ames*[15] for the proposition that "'[w]hat the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.'"[16] The

[9] In relevant part, the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
[10] In relevant part, the Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."
[11] Article I, § 18, of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation."
[12] 262 U.S. 679 (1923).
[13] *Id.* at 690.
[14] *Id*.
[15] 169 U.S. 466 (1898).
[16] *Bluefield,* 262 U.S. at 690 (citing *Smyth v. Ames*, 169 U.S. at 547).

Alaska Supreme Court has recognized this foundational prohibition against confiscatory rates, indicating that rates that "do not afford a reasonable return on the value of property used in the public service" are confiscatory.[17] In other words, the RCA is obligated to establish rates for a regulated utility that will allow the utility to recover its costs plus a reasonable return on the value of its investments.

B. THE RCA'S RATEMAKING PROCESS.

The RCA statutes codify the constitutional obligations described above, and thus the RCA is also statutorily obligated to ensure that the rates charged by a public utility are just and reasonable.[18] The RCA follows a common methodology for determining the just and reasonable cost-based rates that a utility may charge. The methodology consists of determining the utility's total annual "revenue requirement," allocating the revenue requirement among the utility's customer classes ("cost of service"), and setting an appropriate "rate design" to recover the cost of service for each class from the customers in the class. This appeal addresses only decisions by the RCA affecting the revenue requirement. GHU/CUC have not appealed any of the RCA's decisions regarding GHU/CUC's costs of service or rate design. The following subsections provide a brief overview of the revenue requirement in utility ratemaking and how a reasonable return on equity is determined.

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[17] *Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough ("GAAB")*, 534 P.2d 549, 558 n.26 (Alaska 1975). The precedent and practice regarding determining the quantum of return required to avoid confiscation are discussed in Section III.B.1.

[18] AS 42.05.381(a); *see also, e.g.,* Order No. U-16-066(19) at 10 (ENSTAR Natural Gas Company rate case).

1. Revenue Requirement.

In developing rates, the RCA must determine the utility's total revenue requirement, which is the sum of a utility's reasonable costs of operations (including depreciation expense) and a reasonable return on investment (i.e. how much revenue the utility must generate to cover costs and make a reasonable profit).[19] To determine the revenue requirement, the RCA begins with the actual costs of a historical test year.[20] Those costs are then adjusted to produce a "normalized test year" incorporating known and measurable changes that are expected in the period in which the rates will be in effect (the "rate year"). "Appropriate adjustments generally include elimination of out-of-period expenses, normalizing adjustments to remove unusual expenses, and adjustments to incorporate known and measurable changes that will occur in the immediate future."[21] The ratemaking process is not designed to guarantee the utility's actual recovery of historical costs. Rather, "the process is designed to allow the utility an opportunity to recover costs which the utility can be expected to incur in the future, and the test year [is] examined to determine what that level of costs is likely to be."[22]

When determining a reasonable return on investment, the RCA has embraced the guidance of the seminal *Bluefield* and *Hope*[23] decisions of the United States Supreme

[19] *See* Order No. U-81-032(3) at 2-3 (Matanuska Electric Association rate case); *see also* Order No. U-07-076(8)/U-07-077(8) (GHU/CUC rate case).
[20] *Id.*
[21] Order No. U-07-076(8)/U-07-077(8) at 4-5.
[22] Order No. U-87-084(8) at 13-14 (Municipal Light and Power electric rate case).
[23] *Fed. Power Comm'n v. Hope Nat. Gas Co.,* 320 U.S. 591 (1944).

Court.[24] In 1923, the United States Supreme Court in *Bluefield* stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economic management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[25]

In the *Hope* decision, issued in 1944, the United States Supreme Court stated:

> [T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[26]

These decisions can be distilled to the following principles: (1) the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks; (2) the return should be reasonably sufficient to assure confidence in the financial soundness of the utility; and (3) the return should be adequate, under efficient and economical management, for the utility to maintain and support its credit and enable it to raise the money necessary for the discharge of its public duties.[27]

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[24] *See, e.g.*, Order No. U-81-101(8) Appendix (Bench Order Issued October 8, 1982) at 5 ("the Commission, in determining rate of return on equity, reaffirms its acceptance of the 'comparable earnings' and 'capital attraction' standards found in the *Hope Natural Gas* and *Bluefield Water Works* cases") (ENSTAR Natural Gas Company rate case).
[25] *Bluefield,* 262 U.S. at 692-93.
[26] *Hope,* 320 U.S. at 603.
[27] *See, e.g.,* T-04 at 4-6 (Blessing) [Exc. 0379 to 0381; R. 031945 to 031947].

The overall rate of return used in determining a utility's revenue requirement includes the weighted average of the utility's cost of debt and cost of equity. The cost of debt can be determined objectively and is often undisputed.[28] The cost of equity, or return on equity, needed to meet the standards of the *Hope* and *Bluefield* decisions is estimated using a variety of methodologies, which are discussed in greater detail below. The rate of return is calculated by multiplying the cost of debt and the cost of equity by their relative percentage of the total cost of debt and equity.[29] The rate of return is then multiplied by the amount of capital invested in the utility, or "rate base," to calculate the amount to be included in the revenue requirement.

The sum of the rate of return on the rate base and the total normalized operating costs yields the utility's total revenue requirement. The revenue requirement is then compared to the utility's test year revenue to determine whether the current rates are sufficient.[30] A revenue requirement study typically expresses this comparison in both (1) the annual quantity (dollar amount of the utility's revenue deficiency or surplus) and (2) a percentage of test year revenue or the percentage of revenue from certain types of charges.[31]

2. Return on Equity.

As stated previously, it is a well-established ratemaking principle that "the return to

[28] *See, e.g., id.*; *see also*, Order 21 at 54 [Exc. 0837].
[29] Order No. U-06-045(7) at 17 (Anchorage Water and Wastewater Utility rate case).
[30] *See, e.g.,* Order No. U-07-076(8)/U-07-077(8) at 4-5 ("Once the revenue requirement is established, it is compared with the utility's revenue in the same period to determine if a change in the utility's rates is needed.") (GHU/CUC rate case).
[31] *See* T-08 at 6-7 (Wilks) [Exc. 0008 to 0009; R. 032135 to 032136].

the equity owner should be commensurate with returns on investments in other enterprises having corresponding risk."[32] Calculating a utility's reasonable return on equity is difficult when the utility is not publicly traded. A primary tenant of financial theory is that investments with a similar level of risk should have a similar expected return.[33] Accordingly, the common practice in utility ratemaking is to use a proxy group of publicly traded utilities to estimate the return on equity for a non-publicly traded utility.

In an ideal proxy group, the companies would be in the same industry (such as a water/wastewater utility), similar in size, and provide service in a similar service territory as the subject utility. Analyzing a group of similarly situated utilities across a set of methodologies and averaging or consolidating the results should yield a reasonable estimate for the return on equity of the subject utility. If the proxy group is significantly different from the subject utility such that the estimate for the return on equity does not accurately reflect the risks of the subject utility, it is common practice for an analyst to adjust the average return on equity to account for the differences in risk between the subject utility and the proxy group.

As discussed above, the return on equity is estimated using a variety of different methodologies. Because no single method provides a reliable indication of a fair return and investors use all available analyses to develop their expectations, it is common practice in utility ratemaking for analysts to employ multiple methodologies to analyze the proxy

[32] *Hope*, 320 U.S. at 603.
[33] *See* T-04 at 6 (Blessing) [Exc. 0379; R. 031945]; *see also* T-17 at 14 (Parcell) [Exc. 0657; R. 033552].

group and then average the results to estimate a return on equity for the subject utility. Some of these methods include the Capital Asset Pricing Model ("CAPM"), Discounted Cash Flow ("DCF") models, Market to Book ("M/B") equity ratios as a variant to the DCF, and Comparative Earnings ("CE").[34] And while each of these methodologies have general rules on how they are conducted, those rules are neither rigid nor precise. There is a large degree of subjectivity in this field such that it is common for different analysts using the same data to reach different results. Typically, those results will all fall within a reasonable range of proximity. This variation is what leads to experts recommending both a reasonable range for the cost of equity and a specific percentage within that range during ratemaking proceedings.

After determining a cost of equity based on the proxy group data, analysts will recommend making adjustments (risk premiums or reductions) to the results based on differences in risks between the proxy group members and the subject utility in order to better approximate the return on equity for the subject utility. The RCA has approved additional risk premiums when determining the appropriate return on equity for utilities operating in Alaska numerous times, citing the smaller size, geographic location and the

[34] CAPM calculates the cost of equity capital or expected return to a security as a function of the returns to a risk-free security (*i.e.*, Treasury bonds) and a broad market portfolio of securities. The DCF estimate of a company's cost of equity capital is based on the premise that a firm's stock price is equal to the sum of the discounted future cash flows. The M/B approach is premised on the idea that if a utility's allowed return on equity is less than investors' expectations, the utility's stock price will fall, causing the realized dollar return to move towards the investors' expected return evaluated at the market value of equity. The Comparative Earnings approach relies on the actual and projected realized returns of comparable risk companies as a proxy for the cost of equity to the utility of interest.

Alaska-specific risks faced by utilities when compared to proxy groups.[35]

C. INTERIM AND REFUNDABLE RATE INCREASES.

With the filing of a rate case (and as occurred in this case), utilities routinely request that the RCA promptly grant *"interim and refundable"* rate increases. Such interim increases are in effect during the period when the RCA is considering the request for a *permanent* rate increase.[36] From the filing date of the rate increase request, it usually takes 15 months for the allowed permanent rate increase to be adjudicated.[37] If the final adjudicated permanent rate increase is less than the interim increase, then the portion of the interim increase that exceeds the permanent increase must be refunded to customers. This practice stems from the RCA's application of considerations developed by the Alaska Supreme Court in *Alaska Public Utilities Commission v. Greater Anchorage Area Borough*[38] ("*GAAB*").

In *GAAB*, a utility was granted a preliminary injunction to enjoin the Alaska Public

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[35] Order No. U-16-066(19) at 52 (ENSTAR Natural Gas Company rate case) ("We agree that both geographic isolation and ENSTAR's smaller size increase risk."); Order No. U-10-029(15) at 37 (Alaska Electric Light & Power rate case) ("we do not believe that adopting the upper end of the range of ROE analyses in this case, without an explicit adjustment, would adequately compensate AEL&P for its greater risk."); Order No. U-09-090(8) at 13 (Alaska Power Company rate case) (acknowledging the risks faced by APC as a small, remote utility to support a 180 basis point risk premium); Order No. U-05-043(15) at 49 (GHU/CUC rate case) (approving a 250 basis point additional risk premium to GHU/CUC "in light of the unique risks faced by these utilities.").

[36] The RCA has discretionary authority to award interim and refundable rate increases pursuant to AS 42.05.421(c).

[37] *See* AS 42.05.175(c) (requiring the RCA to issue a final order not later than 450 days (approximately 15 months) after a complete filing seeking a change in a utility's revenue requirement or rate design).

[38] 534 P.2d 549 (Alaska 1975).

Utilities Commission ("APUC") from preventing the utility from imposing a rate increase after the APUC, the RCA's predecessor agency, denied the utility's request for an interim rate increase.[39] The RCA has interpreted *GAAB* to require it to grant a utility interim rate relief when the utility demonstrates: (1) that existing rates are confiscatorily low; (2) that those low rates will remain in effect for an unreasonably long period of time; (3) that without an interim rate increase, it will suffer irreparable harm; (4) that the public can be adequately protected in the event the interim increase is ultimately determined to be excessive in amount; and (5) that the magnitude of the utility's request is not "frivolous or obviously without merit."[40]

Under the RCA's interpretation of *GAAB,* the trigger for the RCA's obligation to examine the appropriate level of interim rates is the existence of current rates that produce an unreasonably low rate of return on investment and therefore, are confiscatory.[41] The RCA has noted that, in the context of interim rate increases, if a showing that existing rates are confiscatory has been made, the other elements are "generally established with ease."[42]

Regarding the third factor, irreparable harm, Alaska, like many jurisdictions, recognizes that "'[a] fundamental rule of ratemaking is that rates are exclusively

[39] *Id.* at 552.
[40] Order No. U-80-100(1) at 3 (Municipal Light and Power rate case) (citing *GAAB* at 554, 557-59).
[41] *GAAB*, 534 P.2d at 558 n.26.
[42] Order No. U-80-027(1) (May 9, 1980) (Anchorage Sewer Utility interim rate request).

prospective in nature.'"[43] Alaska's long-standing prohibition on retroactive ratemaking precludes a utility from billing its customers retroactively either upon receiving approval to increase its rates or to recoup past losses.[44] Therefore, if existing rates are confiscatory and interim relief is denied, the utility will have no ability to recover from customers sufficient revenue to avoid confiscation, and the harm therefrom will be irreparable. As the APUC summarized, "[t]he Commission grants interim rate relief to utilities, based on the requirements and criteria established by the Alaska Supreme Court, . . . in order to protect utilities against non-compensatory rates during the period of adjudicating a request for permanent relief."[45] As discussed above, the public is adequately protected in the event the interim increase is ultimately determined to be excessive in amount because the interim rates are refundable.

D. THE PROCEEDINGS BEFORE THE RCA.

Public utilities are required by law to adopt a tariff showing "all rates, . . . classifications, rules, regulations, and terms and conditions under which it furnishes its services and facilities to the general public."[46] The RCA's regulations provide that a utility's tariff "must specifically provide for, and authorize, every rate or charge" and that a utility "may not deviate from its effective tariff or refuse to apply it uniformly. . . ."[47]

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[43] *Matanuska Elec. Ass'n Inc. v. Chugach Elec. Ass'n Inc.*, 53 P.3d 578, 583 (Alaska 2002) (quoting *Far North Sanitation, Inc. v. Alaska Pub. Utils. Comm'n*, 825 P.2d 867, 872 (Alaska 1992)).
[44] Order No. U-80-100(1) at 5 (Anchorage Sewer Utility interim rate request).
[45] Order No. U-87-035(12) at 5 (Chugach Electric Association, Inc. rate case).
[46] AS 42.05.361(a).
[47] 3 AAC 48.320(a) – (b).

On May 31, 2019, GHU/CUC filed with the RCA Tariff Advice Letters TA140-97, TA145 37, TA95-290, and TA101-118, requesting tariff revisions to implement across the board interim and permanent rate increases for water and wastewater utility services based on an adjusted calendar year 2018 test year.[48] Although GHU and CUC each have separate certificates for water and wastewater operations, applications for rates are filed on a joint operations basis in order to achieve "postage stamp" rates previously approved and required by the RCA.[49] GHU/CUC requested a 10.5 percent interim and refundable rate increase for water customers and 12 percent for wastewater.[50] The requested rate increase was primarily driven by a 37.13 percent increase in operating expenses over the prior four years, declining water and wastewater consumption, and new investments in plant since the prior rate case.[51] GHU/CUC's filings were supported by numerous documents, including a Cost Allocation Manual ("CAM"), Revenue Requirement Study and the prefiled testimony of five witnesses.[52] On July 15, 2019, the RCA issued Order 1, which suspended these tariff filings into Dockets U-19-070/U-19-071 and granted GHU/CUC's request for interim rates. Additionally, Order 1 required GHU/CUC to either place the interim rate increases in an escrow account or "agree to pay the statutory rate of 10.5% per

[48] H-001 to H-004 [Exc. 49 to 255 (duplicative tariff advice letter exhibits removed); R. 021472 to 022241 (complete tariff advice filings)].
[49] *See* Order No. U-02-013(7) (GHU/CUC rate case) and Order No. U-05-043(15) (GHU/CUC rate case).
[50] [Exc. 0011, 0050, 0183, 0224; R. 021871, 021473, 021675, 022060].
[51] [R. 021472 to 022241].
[52] All GHU/CUC witness testimonies with exhibits are on the record as T-01 through T-12 [R. 031895 to 032565].

annum, specified by AS 45.45.010(a), on any refunds that may be required at the conclusion of these dockets."[53] Order 1 also required GHU/CUC to advise the RCA whether it would be placing the interim increase into an escrow account or would "pay the statutory interest rate of 10.5% per annum on any refunds made in these dockets" by August 6, 2019. On August 6, 2019, GHU/CUC filed a Notice of Election to Pay Statutory Interest in compliance with Order 1.[54]

On August 22, 2019, GHU/CUC filed TA142-97, TA147-37, TA97-290, and TA103-118 requesting approval of new permanent postage stamp rates for GHU/CUC's water and wastewater operations, based on the results of a joint test year 2018 Cost of Service and Rate Design Study ("COSS"), instead of the across the board permanent rates requested in TA140-97, TA145-37, TA95-290, and TA101-118. The COSS tariff filings were supported by the Prefiled Direct Testimony of one witness, and relied on the information from the Revenue Requirement Studies filed in Dockets U-19-070/U-19-071.[55] Under the COSS filing, the requested permanent rates sought increases to each customer class ranging from 15.23 percent to 22.97 percent.[56] Simultaneous with the COSS tariff filings, GHU/CUC moved to consolidate the COSS filings with Dockets U-19-070/U-19-071. On October 7, 2019, the RCA suspended the COSS tariff filings into Dockets U-19-087/U-19-088 and consolidated the COSS dockets with the rate case

[53] Order 1 at 5 [Exc. 0260; R. 017530].
[54] GHU/CUC's Notice of Election to Pay Statutory Interest, U-19-070/U-19-071 (Aug. 6, 2019) [Exc. 0265 to 0267; R. 017644 to 017646].
[55] T-10 [Koorn] [R. 032344 to 032530].
[56] H-005 to H-008 [Exc. 0295 to 0366; R. 022242 to 022335].

Dockets U-19-070/U-19-071.[57]

Various commercial customers intervened in the proceeding, and the Attorney General's Office, Regulatory Affairs and Public Advocacy Section ("RAPA") elected to participate.[58] After a period of extensive discovery, RAPA submitted testimony from five witnesses on May 19, 2020.[59] GHU/CUC submitted reply testimony from six witnesses on July 7, 2020. The parties reached a partial stipulation on certain issues, and the testimonies filed by GHU/CUC's witnesses Gordon Barefoot, Shawn Elicegui, and Philip Der were admitted into the record, and the witnesses excused from presenting oral testimony at the hearing.[60] A hearing commenced on September 10, 2020 and concluded on September 16, 2020.[61] None of the intervenors submitted testimony or cross examined GHU/CUC's witnesses during the hearing.

Throughout the proceeding GHU/CUC and RAPA disagreed on the appropriate methodology to calculate the average cost of equity associated with the proxy group of companies used by GHU/CUC's and RAPA's witnesses.[62] After reviewing RAPA's witness David Parcell's testimony on return on equity, GHU/CUC's witness David C. Blessing recognized in his prefiled reply testimony that his original Market to

[57] Order No. U-19-070(4)/U-19-071(4)/U-19-087(1)/U-19-088(1) ("Order 4") [Exc. 0367 to 0377; R. 017982 to 017992].
[58] Order No. U-19-070(2)/U-19-071(2) at 4-5 [Exc. 0271 to 0272; R. 017650 to 017651].
[59] T-13 to T-17 [Exc. 0670 to 0703 (excluding T-14); R. 032566 to 033717 (including T-14)].
[60] Order No. U-19-070(17).
[61] Order 21 at 7 [Exc. 0790; R. 37970].
[62] Order 21 at 55-58 [Exc. 0838 to 0841; R. 038018 to 038021].

Book ("M/B") calculations contained significant errors that when corrected reduced the M/B results from 10.2 percent to 6.97 percent.[63] David Parcell's return on equity testimony included a Capital Asset Pricing Model ("CAPM") that produced a return on equity of 6.0 percent, but Mr. Parcell excluded that result from his calculations as it was significantly lower than the results of his other methods, which ranged from 9.2 percent to 10 percent.[64] During Mr. Blessing's oral testimony at the hearing, he testified that he should have excluded the M/B results from his averaging, for the same reasons that Mr. Parcell excluded his CAPM results—namely, that the results are statistical outliers and therefore unreliable.[65]

GHU/CUC and RAPA also disagreed on what amount would be appropriate to include for an additional risk premium to the return on equity for GHU/CUC.[66] GHU/CUC argued that an additional risk premium should be added to the return on equity due to the small size of GHU/CUC compared to the proxy group, and due to the specific risks associated with operating a utility in Fairbanks, Alaska that are not faced by the members of the proxy group.[67] Mr. Blessing provided evidence quantifying a size-specific risk premium based on an analysis of the returns for all publicly traded companies grouped into deciles by market capitalization, with Decile 1 containing the largest firms (>$3.37

[63] Order 21 at 55-56 [Exc. 0838 to 0839; R. 038018 to 083019].
[64] Order 21 at 56 [Exc. 0839; R. 038019].
[65] *Id.*; *see also* Tr. 104 [Exc. 0707; R. 020611], Tr. 149-150 [Exc. 0712 to 0713; R. 020656 to 020657], *and* 190-192 [Exc. 0720 to 0722; R. 020697 to 020699].
[66] *Id.* at 58-60 [Exc. 0839 to 0843; R. 038021 to 038023].
[67] Order 21 at 58-59 [Exc. 0841 to 0842; R. 038021 to 038022].

billion) and Decile 10 containing the smallest (<$322 million) from 1926 to 2018.[68] Mr. Blessing then compared the average returns of Decile 10 to Decile 6 (which was the Decile containing the average market cap of the proxy group companies) to determine that companies in Decile 10 achieved an average return that was 481-basis points higher than that of Decile 6.[69] Mr. Blessing determined due to utilities being less risky than the overall market, and based on RCA precedent awarding size premiums, that a reduction to the 481-basis points was needed and came to the conclusion that 175-basis points was appropriate.[70] While Mr. Parcell did not expressly provide for an additional risk premium, RAPA argued that Mr. Parcell's recommendation of the top end of his calculated range of reasonable returns on equity included an "implicit" risk adjustment.[71]

Mr. Blessing's final recommendations to the RCA were that the reasonable range for GHU/CUC's returns on equity is 11.5 percent to 12.5 percent, including a 175-basis point additional risk premium.[72] Mr. Parcell testified that the appropriate zone of reasonableness for GHU/CUC's return on equity ranged between 9.1 percent and 10 percent, and recommended that the RCA approve a 10 percent return on equity to include a 75-basis point "implicit" additional risk premium.[73]

During the proceeding RAPA disputed certain of GHU/CUC's pro forma

[68] T-04 at 46-49 (Blessing) [Exc. 0388 to 0391; R. 031987 to 031990].
[69] T-04 at 46-49 (Blessing) [Exc. 0388 to 0391; R. 031987 to 031990].
[70] T-04 at 45-49 (Blessing) [Exc. 0387 to 0391; R. 031986 to 031990].
[71] T-17 at 14 (Parcell) [Exc. 0657; R. 033552].
[72] Tr. at 150 (Blessing) [Exc. 0715; R. 020659]; *see also* GHU/CUC Closing Br. at 4-5 [Exc. 0772 to 0773; R. 019906 to 019907].
[73] Order 21 at 59 [Exc. 0842; R. 038022].

adjustments to rate base. RAPA disputed pro forma adjustments to annualize costs for two large plant additions that were placed into service during the test year: the Chena Marina Extension, and the installation of a finer mesh screening system at the wastewater treatment plant. RAPA also disputed pro forma adjustments to rate base proposed by GHU/CUC that sought to include plant additions for clarifiers and influent pumps that were placed into service after the end of the test year, but prior to GHU/CUC's filing the rate case.

Based on a consistent trend of declining consumption by customers, GHU/CUC proposed a consumption adjustment to the test year revenues to better align it with forecasted revenues for the years rates would be in effect. RAPA opposed this adjustment, arguing that there was no revenue decline. During the hearing, Commissioner Scott raised concerns about the statistical robustness and reliability of GHU/CUC's consumption decline forecast.

On January 19, 2021, the RCA issued Order 21 in this proceeding, resolving all outstanding revenue requirement and cost of service issues. Among other things, the RCA determined that for GHU/CUC, 10.53 percent for water and 10.56 percent for wastewater, are reasonable rates of return on equity, including a 75-basis point risk premium.[74] Under the stipulation approved in GHU/CUC's prior rate case, GHU/CUC's return on equity for water was 10.7 percent and 11.0 percent for wastewater.[75] Using 75-basis points as opposed to 175-basis points for the risk adjustment reduced the revenue

[74] *Id.* at 61-62 [Exc. 0844 to 0845; R. 038024 to 038025].
[75] *Id.* at 54-55 [Exc. 0837 to 0838; R. 038017 to 038108].

requirement for GHU/CUC water by $492,301 and by $638,344 for wastewater.

In Order 21, the RCA denied GHU/CUC's proposed pro forma adjustments to plant for the Chena Marina, finer mesh screening system, clarifiers, and influent pump.[76] When viewed in isolation, these decisions have the following impacts to GHU/CUC's revenue requirements:

Plant Adjustment	Utility	Investment	Rev. Req. Impact
Chena Marina	Water	$ 1,670,341	$ (141,016)
Fine Screening System	Sewer	$ 1,938,588	$ (240,781)
Clarifiers	Sewer	$ 975,568	$ (128,219)
Influent Pump	Sewer	$ 153,842	$ (20,220)
Total		**$ 4,738,339**	**$ (530,235)**

Order 21 acknowledges that GHU/CUC are facing declining consumption, but the RCA denied GHU/CUC proposed pro forma adjustment for consumption.[77] Denying the consumption adjustment reduced the revenue requirement for water by $202,935 and for wastewater by $287,920.

GHU/CUC petitioned for partial reconsideration of Order 21, seeking reconsideration of various decisions therein. The RCA issued Order 26, declining to reconsider the decisions that are detailed in this appeal. Petitions for reconsideration are reviewed by the entire Commission, and not just the three commissioners assigned to the panel for a proceeding. Commissioner Robert M. Pickett and Commissioner Janis W.

[76] *Id.* at 48 [Exc. 0831; R. 038011].
[77] Order 21 at 29-30 [Exc. 0829 to 0830; R. 037992 to 037993].

Wilson were not assigned to the panel for GHU/CUC's rate case. In response to GHU/CUC's petition for reconsideration, Commissioner Pickett and Commissioner Wilson issued a dissenting statement, finding (1) that the returns on equity for the water and wastewater utilities were too low; (2) the pro forma adjustment for the finer mesh screening system should have been approved; and (3) GHU/CUC should be able to continue including energy costs for the administrative building in its cost of energy adjustments.[78]

GHU/CUC appealed these decisions to the Superior Court.[79] GHU/CUC had determined that as of May 25, 2021, their total refund liability, in the event that the Court affirms all of the disputed RCA decisions at issue in this appeal, was $793,383, plus accrued interest, for a total of $869,640, and deposited that amount into an escrow account.[80] On December 21, 2022, the Superior Court issued an order affirming the RCA's decisions in Orders 1, 21, and 26 on all issues appealed. This appeal followed.

On August 17, 2021, GHU/CUC filed four new consolidated rate cases with the RCA based on a 2020 test year. The RCA granted GHU/CUC's requested interim rate increases effective October 1, 2021, in RCA Order No. U-21-070(1)/U-21-071(1). The parties in that docket reached a settlement, including stipulating to an 11 percent (11%)

[78] Dissenting Statement of Commissioner Robert M. Pickett and Commissioner Janis W. Wilson to Order 26 [Exc. 0890 to 0892; R. 038044 to 038046].
[79] *See* GHU/CUC's Notice of Appeal, 3AN-21-06152 CI (May 26, 2021) [R. 037952 to 037954].
[80] *See* GHU/CUC Memorandum in Support of Motion for Stay, at 4-5, Case No. 3AN-21-06152 CI (May 26, 2021).

return on equity, which was approved by the RCA in Order No. U-21-070(12)/U-21-071(12) (Sept. 9, 2022). Thus, the interim rate increases at issue in this instant appeal have been superseded by new final rates that are currently in effect. Consequently, the dollar amount at issue in this instant appeal is the $1,023,359.23 placed in escrow at the time of appeal to the Supreme Court, plus any interest earned in that account.[81] That is, if GHU/CUC ultimately prevailed on all issues in this appeal and on remand, GHU/CUC would retain the approximately $1 million that it is currently holding in escrow plus escrow account interest. On the other hand, if the RCA ultimately prevailed on all issues in this appeal, including the assessment of 10.5 percent interest on refunds, GHU/CUC would have to refund that amount.

STANDARD OF REVIEW

In administrative appeals, the Alaska Supreme Court "independently review[s] the merits of the administrative decision" because the superior court acted as an intermediate court of appeals.[82] The Court recognizes four standards of review of administrative decisions. The Court applies a substantial evidence standard to questions of fact, a reasonable basis standard to questions of law involving agency expertise, a substitution of

[81] *See* GHU/CUC Motion to Stay December 21, 2022 Decision at 6, Case No. 3AN-21-06152CI (December 30, 2022) [Exc. 0913 to 0915; R. 038086 to 038091]; Order Granting Motion to Stay December 21, 2022 Decision, Case No. 3AN021-01652CI (January 11, 2023) [Exc. 0921 to 0923; R. 038078 to 038080].
[82] *Gottstein v. State, Dep't of Nat. Res.,* 223 P.3d 609, 620 (Alaska 2010).

judgment standard to questions of law not involving agency expertise, and a reasonable and not arbitrary standard to an agency's interpretation of its own regulations.[83]

An agency's factual findings are affirmed if "supported by substantial evidence."[84] Under the substantial evidence standard, the Court assesses whether there is substantial evidence in the record as a whole to support the agency's findings.[85] Substantial evidence exists if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[86] Substantial evidence exists "if, considering the record as a whole, the quantum of evidence is substantial enough such that a reasonable mind might accept the [agency's] decision."[87] Under this standard, the Court will "not independently weigh the evidence but only determines whether such evidence exists."[88] The Court does not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony.[89]

Courts apply the substitution of judgment standard where "the question presented does not involve agency expertise."[90] The substitution of judgment standard "is

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[83] *Id.*
[84] *Id.*
[85] *Noey v. Dep't of Envtl. Conservation,* 737 P .2d 796, 801 (Alaska 1987).
[86] *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).
[87] *United Utils., Inc. v. Alaska Pub. Utils. Comm'n*, 935 P.2d 811, 814 (Alaska 1997).
[88] *Id.; see also, Lindhag v. State, Dep't of Nat. Res.*, 123 P.3d 948, 952 (Alaska 2005) (stating that under the substantial evidence test, the Court does not "reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony").
[89] *Vonder Harr v. State, Dep't of Admin., Div. of Motor Vehicles,* 349 P.3d 173, 177 (Alaska 2015).
[90] *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003).

appropriate where the knowledge and experience of the agency is of little guidance to the court or where the case concerns statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge."[91]

The reasonable basis standard of review applies where there are administrative determinations with "complex issues involving agency expertise and specialized knowledge."[92] Under this standard of review, the courts "give deference to the agency's determination 'so long as it is reasonable, supported by the evidence in the record as a whole, and there is no abuse of discretion.'"[93] The reasonable basis standard permits the court to consider factors of agency expertise, policy, and efficiency in reviewing discretionary decisions[94] and is appropriate "where the agency action involves . . . an assessment of technical data related to complex subject matter which requires the particularized knowledge and experience of the administrative personnel for their determination."[95] When applying the reasonable basis standard, the Court must determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if the Court may not agree with the agency's ultimate determination.[96]

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[91] *Id.* (internal quotations and citations omitted).
[92] *Cook Inlet Pipe Line Co. v. Alaska Pub. Utils. Comm'n*, 836 P.2d 343, 348 (Alaska 1992).
[93] *United Utils.,* 935 P.2d at 814.
[94] *Jager v. State*, 537 P.2d 1100, 1107-08 (Alaska 1975).
[95] *Noey*, *supra* at 801 (citing *United States v. RCA Commc'ns, Inc.,* 597 P.2d 489, 507 (Alaska 1978) (quoting *Alaska Public Utils. Comm'n v. Greater Anchorage Area Borough,* 534 P.2d 549, 558–59 (Alaska 1975)), *aff'd on rehearing,* 597 P.2d 512 (Alaska 1979)).
[96] *Davis Wright Tremaine LLP v. State, Dep't of Admin*., 324 P.3d 293, 299 (Alaska 2014).

In this case, the substantial evidence standard applies to the Commission's conclusions regarding factual determinations and the reasonable basis standard applies to questions of law requiring agency expertise.

ARGUMENT

A. IN ALL ORDERS ON APPEAL, THE COMMISSION DOES NOT PROPERLY EXPLAIN WHY IT DEVIATES FROM PRECEDENT IN CONTRADICTION OF THE WELL ESTABLISHED PRINCIPLES OF *STARE DECISIS* IN AGENCY DECISIONMAKING.

he to adhere to the well-established principle in administrative law that an agency should follow its own precedent, or if not, explain why it deviates from precedent.

In the administrative context, both federal and state courts recognize a modified doctrine of *stare decisis* applicable to administrative agency decisions, including agencies that conduct utility ratemaking. In the federal context, administrative agencies "are not bound by the doctrine of stare decisis," but "[a]gencies have a duty" to explain departures from agency norms."[97] An agency "cannot disregard its own precedents but must reasonably explain an alternation of policy."[98] "If an agency "announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute arbitrary and capricious action."[99] Agencies that

[97] *Pre-Fab Transit Co. v. United States*, 595 F.2d 384, 387 (7th Cir. 1979) (internal quotations and citations omitted).
[98] *Id*.
[99] *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1062–64 (N.D. Cal. 2018) (internal quotations and citations omitted).

change course must "supply a reasoned analysis for the change."[100] While a federal agency is not required to "grapple with every last one of its precedents, no matter how distinguishable," an agency cannot "completely ignore relevant precedent."[101] Where a party "makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument."[102]

In the context of federal utility regulation, decisions by the Federal Energy Regulatory Commission ("FERC") have been remanded where FERC was "more permissive" with several other "similarly situated" utilities, but failed to explain the "disparate treatment" of the appellant utilities filings.[103] The District of Columbia Circuit has found that on "arbitrary and capricious" review, it was FERC who bore the burden to "provide some reasonable justification for any adverse treatment relative to similarly situated competitors."[104] In *Baltimore Gas & Electric Co. v. FERC*, the Circuit Court found that the appellant had made a threshold showing that the other utilities were similarly situated, and that FERC needed to explain different treatment under the same rules, and that merely stating that prior decisions were uncontested or did not provide a reasoned analysis was not adequate.[105] The Court emphasized:

> [T]he duty to explain inconsistent treatment is incumbent on the agency and cannot be waived by the decisions of third parties. Neither of those parties

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[100] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983).
[101] *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010).
[102] *LeMoyne-Owen Coll. v. N.L.R.B.*, 357 F.3d 55, 61 (D.C. Cir. 2004).
[103] *Baltimore Gas & Elec. Co. v. F.E.R.C.*, 954 F.3d 279, 283 (D.C. Cir. 2020).
[104] *Id*.
[105] *Id.* at 283-286.

> could contract away FERC's statutory duty—imposed by the APA and owed to all *other* regulated parties—to provide some reasonable justification for any adverse treatment relative to similarly situated competitors.[106]

The District of Columbia Circuit regularly vacates and/or remands where FERC has not explained a departure from precedent sufficiently.[107]

The Alaska Supreme Court has held that "consistent with Alaska law and decisions of the United States Supreme Court, agencies may overrule a prior decision if convinced it was wrongly decided," but that "[w]hen overruling a prior decision, the agency must provide a reasoned analysis that explains why the change is being made."[108] And an agency still "may not act in an arbitrary, unreasonable, or discriminatory fashion."[109] The Court

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[106] *Id.* at 285 (internal quotations and citations omitted).

[107] *See, e.g., Williams Gas Processing-Gulf Coast Co., L.P. v. F.E.R.C.*, 475 F.3d 319, 328–30 (D.C. Cir. 2006) (vacating and remanding to agency for further proceedings where FERC failed to "acknowledge the need to reconsider its precedent, announce its definitive adoption of the principles, and explain their impact on the existing primary function test). The Court in *Williams* also cited to other cases where an agency did not explain its decision or distinguish from precedent. *See PG & E Gas Transmission, Nw. Corp. v. F.E.R.C.,* 315 F.3d 383, 390 (D.C. Circ. 2003) ("FERC has given no explanation whatsoever for this apparent shift in Commission policy. FERC's failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process."); *Mo. Pub. Serv. Comm'n v. F.E.R.C.,* 234 F.3d 36, 41 (D.C.Cir.2000) ("A passing reference ... is not sufficient to satisfy the Commission's obligation to carry out reasoned and principled decisionmaking. We have repeatedly required the Commission to fully articulate the basis for its decision.") (internal quotation marks omitted).

[108] *May v. State, Com. Fisheries Entry Comm'n*, 168 P.3d 873, 884 (Alaska 2007); *see also Black v. Municipality of Anchorage, Bd. of Equalization,* 187 P.3d 1096, 1102–03 (Alaska 2008) (administrative agencies "can change their rulings from prior years if they first provide a reasoned and supportable basis for reaching a different result") (internal quotations and citations omitted).

[109] *Id.*

explicitly applied this doctrine to decisions by the RCA in *Amerada Hess Pipeline Corp. v. Regulatory Commission of Alaska* ("*Amerada Hess*").[110]

Similarly, other state public utility commissions are bound by the doctrine of administrative *stare decisis*, and other state courts remand utility commission decisions where applicable. For instance, the Indiana Court of Appeals remanded a ratemaking decision to the public utility commission where it "failed to explain its decision" to adhere to a new standard regarding the reasonableness of a utility's charges and disregarding types of evidence that were deemed sufficient in the utility's previous rate cases.[111] A Pennsylvania court remanded a matter to the agency where the commission attempted to require substantiation of an adjustment where it previously had "specifically refused to require that a company perform a definitive study of the relationship between the specific items adjusted and the price factors."[112] If the commission was going to require substantiation, it needed to "provide explicit standards for substantiation, and explain its divergence from earlier decisional law."[113]

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[110] 176 P.3d 667, 685 (Alaska 2008) (finding that RCA adequately explained "any departure" from agency precedent where it "explained its reasoning" to step "beyond a primary reliance on a DCF methodology to a more catholic acceptance of other methods" where it found that one party's witness to be compelling).

[111] *Hamilton Se. Utils., Inc. v. Indiana Util. Regul. Comm'n*, 85 N.E.3d 612, 622 (Ind. Ct. App. 2017), *transfer granted, opinion vacated*, 95 N.E.3d 1294 (Ind. 2018), and *opinion aff'd in part, vacated in part*, 101 N.E.3d 229 (Ind. 2018) (vacated on other grounds).

[112] *Nat'l Fuel Gas Distribution Corp. v. Pennsylvania Pub. Util. Comm'n,* 677 A.2d 861, 865 (Pa. Commw. Ct. 1996).

[113] *Id.*

In 2020, the Supreme Court of Montana affirmed a lower court decision and remanded a rate setting decision where it found the Montana Public Service Commission ("PSC") did not follow the agency *stare decisis* doctrine. The PSC had "declined to include a carbon adder when setting the avoided-cost rate" in the matter and justified it by stating that the likelihood of federal carbon regulation had decreased.[114] The Court found that "conjecture about an increasingly hostile political climate" does not "establish a clear and forecastable adjustment, necessary to comply with its own precedent."[115] The Court further explained:

> The PSC noted that it was reasonable to depart from past precedent given the "unknowable, potential regulatory actions at the federal level [,]" citing its "authority and technical fact finding expertise to appropriately balance the future risk of carbon costs to be borne by customers." However, the PSC found such reasoning proffered by the Consumer Counsel in *Crazy Mountain Wind*, decided only months earlier, to be inadequate. In declining to reconsider including a carbon adder in the avoided-cost rate, the PSC made no effort to distinguish the facts in this case from those in *Crazy Mountain Wind* or explain why its decision was acceptable under the facts in this docket. Indeed, beyond its brief references to the speculative nature of carbon pricing and a presidential administration hostile to carbon regulation, the PSC did not attempt to explain why carbon emissions should not be considered in the avoided-cost rate. Mere speculation based on political forecasting hardly constitutes technical or scientific knowledge worthy of deference. Nor does an agency's reference to its own technical expertise constitute a reasoned decision.[116]

[114] *Vote Solar v. Montana Dep't of Pub. Serv. Regul.*, 473 P.3d 963, 977, *as amended on denial of reh'g* (Oct. 6, 2020).
[115] *Id*.
[116] *Id.* at 977-78 (internal citations and quotations omitted).

B. RETURN ON EQUITY

Order 21 contains multiple decisions that impact the calculation of the return on equity ("ROE") approved for GHU/CUC's water and wastewater revenue requirements that are not reasonably based on the facts of the record, do not have a reasonable basis in the law, and are contrary to relevant Commission precedent and for which the Commission failed to provide an adequate explanation for the departure. As a result, the ROEs established in Order 21 are unreasonably low and using those ROEs to calculate a final revenue requirement results in rates that are confiscatory, unjust and unreasonable.

AS 42.05.191 requires that "[e]very formal order of the commission shall be based upon the facts of record. . .. Every order entered pursuant to a hearing must state the commission's findings, the basis of its findings and conclusions, together with its decisions." The Alaska Supreme Court in *Amerada Hess* held:

> The court reviews RCA's factual findings under a 'substantial evidence' standard; they should be upheld if supported by relevant evidence that a reasonable person might accept as adequate to support them. As to questions of law not implicating RCA's special expertise, this court substitutes its own judgment. If RCA employs specialized expertise in a legal determination, the court apples a rational basis standard; RCA's interpretation prevails over the court's, so long as RCA is reasonable. The deferential 'reasonable basis' standard also applies to fundamental policy decisions. But a failure to consider an important factor can undermine the reasonableness of a policy decision. Also, an unexplained failure to follow agency precedent can erode the deference due a policy decision.[117]

[117] 176 P.3d at 673 (citing *Alyeska Pipeline,* 77 P.3d at 1231; *Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1217 (Alaska 1996); *Totemoff v. State*, 905 P.2d 954, 967-68 (Alaska 1995)).

The RCA has a history of inadequate explanations in orders on the determination of ROEs. In 2019, the superior court found that "the RCA failed to provide adequate findings or reasons for its ROE determination such that the record is inadequate to permit meaningful judicial review."[118] In particular, the superior court found that "[i]t is unclear from the record why the RCA lowered the currently approved 10.93% ROE to 10.7%."[119] The superior court ordered on remand that the RCA make its findings on how it calculates the ROE and to address what evidence it relied on in reaching the ROE.[120]

Order 21 provides an explanation of the methodology the RCA employed to calculate the ROEs for GHU/CUC water and wastewater.[121] However, the RCA did not provide an adequate basis in the record for two of its decisions that significantly lowered the ROE: 1) the appropriate treatment of analysis results that are statistical outliers; and 2) calculation of an additional risk premium.

In their Dissenting Statement to Order 26, Commissioner Pickett and Commissioner Wilson stated, "[w]e agree that the returns on equity for the water utility and the wastewater utility established in Order U-19-070(21) are too low."[122] Commissioner Wilson would grant a ROE of 11.53 percent for GHU/CUC's water utility and 11.56 percent for the wastewater utility based on the differences in risk between GHU/CUC and the proxy

[118] *Providence Health and Servs. v. Regulatory Comm'n of Alaska*, Order on Appeal, Case No. 3AN-18-06427 CI at 28-30 (May 20, 2019).
[119] *Id.* at 30.
[120] *Id.*
[121] Order 21 at 60-61 [Exc. 0843 to 0844; R. 038023 to 038024].
[122] Dissenting Statement at 2 [Exc. 891; R. 038045].

companies and the risk of GHU/CUC's declining consumption.[123] Commissioner Pickett would grant a ROE "to at least the levels last used to set rates for GHU/CUC—10.7% for the GHU/CUC water utility and 11.0% for the GHU/CUC wastewater utility."[124] Commissioner Pickett also stated that the record in the dockets may even support a higher ROE, but could not agree to the levels proposed by Commissioner Wilson.[125]

1. The Market to Book ("M/B") Analysis should be excluded from the calculations of GHU/CUC's ROE because it is a statistical outlier.

The RCA's decisions requiring the use of the M/B Analysis to calculate the ROE are not based upon facts of the record. Additionally, the RCA provided insufficient explanation of the basis for these findings and conclusions to allow for a judicial review of the reasonableness of those findings.[126] Order Nos. 21 and 26 require the use of GHU/CUC witness David C. Blessing's M/B analysis, and to give it equal weight to other methodologies used, in calculating the ROEs for GHU/CUC based on the proxy group analyses. The RCA reached this finding despite testimony from Mr. Blessing that the result of his M/B analysis is so far outside the range of the other analyses that it should be excluded as a statistical outlier.[127] RAPA's ROE witness Dave C. Parcell similarly did not include the results of his CAPM analysis in his ROE recommendations, as it was

[123] *Id.*
[124] *Id*.
[125] *Id*.
[126] *See* Order 21 at 60-61 [Exc. 0843 to 0844; R. 038023 to 038024]; *see also* Order 26 at 6-7 [Exc. 0881 to 0882; R. 038035 to 038086].
[127] Tr. 104 [Exc. 0707; R. 020611], Tr. 149-150 [Exc. 0712 to 0713; R. 020656 to 020657], *and* 190-192 [Exc. 0720 to 0722; R. 020697 to 020699].

significantly less than his DCF and CE results.[128] Despite both ROE witnesses advocating for exclusion of results that are too low, the RCA justified ignoring that evidence in the record with the unsupported statement that "[a]n outlying result is not necessarily an incorrect result."[129] This decision by the RCA to reject the testimonial evidence of the ROE expert witnesses from both parties is arbitrary and capricious and there is no basis in the record to support it as reasonable. To the extent the RCA is implicitly relying on its own technical expertise, this Court should adopt the position of the Montana Supreme Court, that an agency's reference to its own technical expertise does not constitute a reasoned decision.[130]

There is also RCA precedent, as discussed below, that supports rejecting data inputs from proxy analyses that are statistical outliers, even if no party has requested it. Alternatively, there is RCA precedent for including a statistical outlier in ROE calculations, but only by giving it lesser weight than the other models used by the parties. Finally, in Order 21 the RCA erroneously represented that GHU/CUC claimed that the M/B analysis is "more accurate" than the other methods used by the parties, despite clear evidence in the record to the contrary.[131]

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[128] T-17 at 64-65 (Parcell) [Exc. 0662 to 0663; R. 033602 to 033603]; Order 21 at 56-57 [Exc. 0839 to 0840; R. 038019 to 038020].
[129] Order 21 at 61 [Exc. 0844; R. 038024].
[130] *Vote Solar,* 473 P.3d at 977-78, *as amended on denial of reh'g* (Oct. 6, 2020).
[131] Order 21 at 60-61 [Exc. 0843 to 0844; R. 038023 to 038024].

a. Not removing the statistical outlier, as is required by Order 21, is inconsistent with Commission precedent.

As recognized by Mr. Blessing's testimony on the stand, the results of Mr. Blessing's M/B analysis are inconsistent with the results of his CAPM, DCF, and CE analyses, and should be excluded.[132] Order 21 states, "We find no analytical support for both GHU and CUC and RAPA's contentions that their respective 6.97% Market to Book and 6.1% CAPM results should be excluded from consideration."[133] Order 21 continues to state, "An outlying result is not necessarily an incorrect result."[134] Based on these statements, Order 21 requires GHU/CUC to use an updated M/B of 6.87 percent in determining the ROE calculation, granting it equal weight to the CAPM, DCF, and CE analyses recommended by Mr. Blessing.[135] Order 21's rejection of both Mr. Blessing's and Mr. Parcell's recommendations to exclude models that produce outlying results in ROE analysis is inconsistent with RCA precedent.

The RCA has on multiple occasions removed statistical outliers in ROE and proxy group analyses. In a prior GHU/CUC docket, in Order No. U-07-076(8)/U-07-077(8) ("Order No. U-07-076(8)"), the RCA adopted the ROE derived from the DCF and CAPM analyses proposed by the AG's witness, but adjusted the DCF analysis by removing a

[132] Tr. 104 [Exc. 0707; R. 020611], Tr. 149-150 [Exc. 0712 to 0713; R. 020656 to 020657], *and* 190-192 [Exc. 0720 to 0722; R. 020697 to 020699].
[133] Order 21 at 60 [Exc. 0843; R. 038023].
[134] *Id*. at 61 [Exc. 0844; R. 038024].
[135] The revised M/B result was 6.97%. Order 21 reduced it to 6.87% by removing the flotation cost adjustment. The RCA's removal of the flotation cost adjustment is not raised in this appeal.

member of the proxy group from the projected and historical earnings per share growth rate estimation.[136] Specifically, the RCA stated:

> We do not adopt in totality the DCF study results of either Woolridge or Moul. Rather we make adjustments to the DCF model presented by Woolridge as a result of the testimony or our own analysis of the record.
> . . .
> We find that the 15 percent growth rates forecasted for CWS to be a statistical outlier that should be excluded from the analysis. We recognize that this decreases the data population, but CWS's projected rate of growth was too far from the median value and thus inappropriately inflated the average. Excluding CWS, we arrive at an average earnings per share (EPS) future growth rate of 7.74 percent.
>
> We also find that the inclusion of CWS in the historical growth rates presented by Woolridge have the opposite effect. They substantially dampen the overall mean for the five and ten historical year growth rates for EPS and dividends per share (DPS) and consequently, the overall average of all of the growth factors evaluated by Woolridge by over 60 basis points. Without the dampening effect of CWS, the historical five-year EPS growth rates presented by Woolridge for the small water utility group reasonably approximate the projected EPS data from which we derived the 7.74 percent noted above. We believe this relationship to be significant and that substantiates, in part, our reliance on the modified projected EPS growth rate of 7.74 percent for our DCF model.[137]

(Internal citations omitted; emphasis added). When the RCA discarded the 15 percent growth rate for CWS from the analysis, it reduced the small water company proxy group

[136] Order No. U-07-076(8)/U-07-077(8) at 65 (GHU/CUC rate case). GHU/CUC note that this order was later revised by the Commission in subsequent orders, and that several issues were the subject of a later appeal and remand from the Superior Court. However, the issue related to the Commission's *sua sponte* exclusion of the outlier in the growth rate analysis was not reconsidered or appealed by any party.

[137] *Id*. at 64-65 (citing to Exhibit JRW-7 at 5 in that docket, which is located at Exc. 0873; R. 020195).

from four companies to only three, a proxy group less than half the size of that used by GHU/CUC in the current proceeding.

In Order No. U-07-076(8), the RCA determined that weighting one of four data points equal to the other three was inappropriate (and that complete removal was necessary), because that data point was a statistical outlier. That outlier was approximately double the value of the remaining data points that the RCA kept in the analysis. By removing it, the RCA reduced the average in the model from 9.56 percent to 7.74 percent, which reflects a 19 percent decrease in the result the RCA required GHU/CUC to use as part of the model to determine the ROE. No party in that docket raised, requested, or provided evidence in support of removing this statistical outlier, nor was there any "analytical support" in the record for excluding the outlier. Nonetheless, a 19 percent impact to a statistical input that was one component of the final ROE calculation was considered by the RCA to cause the average used to be "inappropriately inflated" requiring the RCA to act on its own to exclude it in order to establish just and reasonable rates.

In Order No. U-08-157(10), the RCA again based its ROE determination on results from DCF and CAPM model results.[138] The RCA rejected three additional approaches put forth by AWWU's witness stating that they did not improve or clarify the record regarding AWWU's cost of equity. The RCA also removed a certain data point from the model it required the utility to use to determine ROE, because "that figure is a statistical outlier."[139]

[138] Order No. U-08-157(10) at 31-32 (AWWU rate case).
[139] Order No. U-08-157(10) at 38 (AWWU rate case). GHU/CUC note that although the Commission later reconsidered Order No. U-08-157(10) to clarify certain issues, the

In that docket for AWWU, when compared to the projections made by all of the analysts for the whole proxy group, excluding the ones rejected by the RCA, the projections ranged from 5.0 percent to 15.0 percent, making American States Water ("ASW") an outlier. When compared to the projections made by other analysts for ASW, which ranged from 7.0-9.5 percent, the excluded First Call data projection of 4.0 percent for ASW was an outlier with approximately half the value predicted by the other analysts. Including the outlier, as was Woolridge's position in the proceeding, resulted in an average projection for ASW of 7.3 percent. The RCA's exclusion resulted in an average projection of 8.4 percent for ASW, with an overall group average projection of 7.9 percent. If the 4 percent were not excluded from the RCA's analysis, the overall average would have dropped from 7.9 percent to 7.76 percent. This represents an increase of approximately 1.8 percent in the resulting ROE directly attributable to the exclusion of the outlier required by the RCA. Although not stated as clearly as the exclusion in Order No. U-07-076(8), presumably the RCA considered a 1.8 percent impact by a statistical outlier to be significant enough to warrant action by the RCA to exclude it on its own accord, without testimonial or analytical support in the record to justify taking this action.

In this case, the outlier at issue is the result of one of the four models (DCF, CAPM, Comparable Earnings and Market/Book DCF) that were given equal weight and averaged to calculate an appropriate cost of equity for GHU/CUC based on a proxy group. The table

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reconsideration and clarification in Order No. U-08-157(12) did not impact the ROE analysis.

below is from Order 21 at page 62, and is a summary of the estimated weighted average cost of capital from the four models used by Mr. Blessing in his ROE analysis:

	Water	**Wastewater**
DCF	11.12%	11.12%
Comparable Earnings	10.84%	10.84%
Market/Book DCF	6.87%	6.87%
CAPM	10.28%	10.41%
Overall ROE w/o Risk	9.78%	9.81%
Approved Risk	0.75%	0.75%
Overall ROE with Risk	10.53%	10.56%

In calculating the proxy group average ROE of 9.78 percent for the Water and 9.81 percent for the Wastewater operations, the RCA took the simple average of the results of the four ROE estimation models proposed by GHU/CUC. The table above shows that three of the approaches (DCF, CAPM and Comparable Earnings) yielded proxy group averages within 84 basis points of each other for Water and within 71 basis points for Wastewater – a less than ten percent difference within each group. For Water, the Market/Book DCF approach was 341 basis points or 33 percent below the next lowest result. The Market/Book approach result was 354 basis points or 34 percent below the next lowest result for Wastewater. The four approaches estimate the same thing over the same time period. It is expected that the results, while not necessarily the same, should be reasonably close, as the RCA noted in Order U-08-157(10).[140] That is not the case here and, as the RCA has done in past proceedings, the RCA should not give the same weight to the outlier result.

[140] Order No. U-08-157(10) at 33 (AWWU rate case).

Including the 6.87 percent outlier produces averages of 9.78 percent and 9.81 percent for water and wastewater respectively. Removing the 6.87 percent outlier and relying on the results of Mr. Blessing's DCF, CAPM and Comparable Earnings models changes these averages to 10.75 percent and 10.79 percent—a 9.6 percent difference.

Given equal weight to all data in a set, the more distant a number is from the mean of the set, the greater the impact that outlier has to skew the average of the set. In other words, the 9.6 percent by which including the M/B result skews the average of its dataset can be compared to the impacts of excluding the outliers in Order No. U-07-076(8) and Order No. U-08-157(10) to those data sets, 19.0 percent and 1.8 percent respectively. If an outlier with a 1.8 percent impact to a data set that was just one component of the ultimate cost of equity calculation warranted the RCA to act on its own to exclude it for AWWU in Order No. U-08-157(10), then it is even more justified for the RCA to exclude an outlier that has an impact on its dataset that is more than five times greater in this case. Although the magnitude of the impact the outlier in Order No. U-07-076(8) had on its data set is greater than the impact the M/B has on its dataset, the final impact that the M/B has on the ROE is much greater than the effect that excluding the 15 percent EPS growth forecast for CWS had on the final ROE determination in that proceeding.

Unlike the decisions in Order No. U-07-076(8) and Order No. U-08-157(10), the record in this proceeding has testimonial evidence from two expert witnesses to support

the practice of excluding statistical outliers.[141] The M/B result of 6.97 percent is so great an outlier that as Mr. Blessing testified at hearing:

> [I]f you average the other estimates [Blessing's CAPM, DCF, and CE], took the standard deviation, it was like seven standard deviations away from the average of the others. . .. if I had seen that, I would have done what Mr. Parcell did, which is CAPM, which was like six percent. I would have excluded it saying, you know, it's an outlier and I don't think it should be included.[142]

Typically, a result that is more than two standard deviations from the average is considered to be a statistical outlier, i.e., an observation that has a very low probability of accurately reflecting the true expected value of the variable.[143]

If the RCA was justified in exercising its discretion to exclude statistical outliers without any evidence in the record, testimonial or analytical, for AWWU and GHU/CUC in prior rate cases, then it is all the more appropriate for the RCA to do so here. This Court recently stated, "[p]ast decisions provide regulated entities with notice of the agency's expectations and allow courts and the public to verify that the agency's decision-making is consistent across parties and over time."[144] While no party included analytical evidence to

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[141] Order 21 at 55-58 [Exc. 0838 to 0841; R. 038018 to 038021]; Tr. 190-192 [Exc. 0720 to 0722; R. 020697 to 020699]; T-17 at 65 (Parcell) [Exc. 0663; R. 033603].
[142] Tr. at 191 (Blessing) [Exc. 0721; R. 020698].
[143] Assuming a normally distributed variable, the probability of an observation being two or more standard deviations from the mean is 2.28%. The probability of an observation being four standard deviations from the average is 0.0001%, and even less for seven standard deviations. A probability of being a valid result that is objectively and quantitatively less than 0.0001% definitionally cannot meet the preponderance of the evidence standard required in ratemaking. *See generally*, *Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdivision*, 902 P.2d 766, 774 n.15 (Alaska 1995) (citations omitted).
[144] *AVCG, LLC v. Dep't of Nat. Res.,* 527 P.3d 272, 286 (Alaska 2023).

support the basic premise in statistics of excluding an outlier from a dataset, Mr. Blessing testified on the stand that it was an error to include the M/B in the analysis because it is a statistical outlier in the data set.[145] Mr. Blessing's testimony at hearing provides a greater evidentiary record on which the RCA could base a decision to justify excluding a statistical outlier than was present in other cases where the RCA did exclude outliers. The RCA's decision requiring the inclusion of the statistical outlier at full weight is inconsistent with its prior decisions, including prior decisions for GHU/CUC.

Requiring the inclusion of a clear, statistical outlier is contrary to RCA precedent and the RCA provided no explanation for this departure. As stated by the Supreme Court, "an unexplained failure to follow agency precedent can erode the deference due a policy decision."[146] In isolation, the inclusion of the M/B result in the ROE decreased GHU/CUC's annual revenue requirements by approximately $242,402 for water and $315,948 for wastewater. Including this statistical outlier resulted in rates that are confiscatory, depriving GHU/CUC of the opportunity to recover more than $550,000 annually while those rates were in effect.

b. The M/B should not be given equal weight to the other models in determining ROE.

[145] Tr. at 191 [Exc. 0721; R. 020698].
[146] *Amerada Hess,* 176 P.3d at 673 (citing *Alyeska Pipeline,* 77 P.3d at 1231; *Ninilchik Traditional Council*, 928 P.2d at 1217; *Totemoff*, 905 P.2d at 967-68).

This subsection is provided in the alternative to the arguments presented above and should not be construed as a concession by GHU/CUC as to the propriety of the remedy it is seeking to exclude the outlying M/B data entirely from the ROE analysis.

Mr. Blessing's M/B analysis, after correcting the errors identified by RAPA's witness Mr. Parcell, provides a 6.97 percent cost of equity. Mr. Blessing's other models produced the following costs of equity: CAPM 10.38 percent (Water) 10.51 percent (Wastewater), DCF Variable Growth 11.22 percent ("DCF"), and CE 10.94 percent. Order 21 requires GHU/CUC to eliminate the flotation cost adjustment of 10 basis points and give equal weight to each of Mr. Blessing's four models in calculating the cost of equity. This approach is inconsistent with RCA precedent.[147]

In the AWWU docket, the cost of capital experts used by both AWWU and RAPA performed DCF and CAPM computations to recommend a cost of equity.[148] RAPA's witness used one CAPM model result of 8.13 percent and one DCF model result of 9.81 percent, based on a water proxy group, but gave a 95 percent weight to the DCF model in recommending a 9.75 percent cost of equity rate for AWWU.[149] AWWU's witness used four variations of CAPM and weighted them equally, despite acknowledging that traditional CAPM may understate the cost of equity.[150] The RCA in Order No. U-08-157(10) expressed concern about the wide range in the models' results:

[147] Order 21 at 63 [Exc. 846; R. 038026].
[148] Order No. U-08-157(10) at 29 (AWWU rate case).
[149] *Id.* at 32-33.
[150] *Id*. at 33.

> While the use of the CAPM model and the DCF model in this proceeding appear to provide widely different results, we prefer not to rely on only one method to estimate the costs of equity. Alaska public utilities are not publicly traded and frequently do not have a common equity shares component to their capital structure, so neither model is more appropriate than the other for Alaska utilities. **However, we agree with Zepp that the unadjusted CAPM seemed to result in conservative cost of equity calculations from both experts making an equal weighting between the two models inappropriate**. We also do not find that the 95 percent reliance on the DCF model is appropriate given the small sample of publicly-traded water utilities considered in the DCF model. Therefore, we conclude that a reasonable weighing between the two models must fall somewhere greater than 50% and far less than 95%. The parties did not offer specific testimony on how we should weigh the results between CAPM and DCF, rather each recommended a return based on the results of all their models and their expertise. **Without testimony on an appropriate weighting, but with the expressed reservations on the CAPM model testified to by Zepp, we will give less weight to the CAPM model and more weight to DCF model. Our results will be weighed at 60 percent for the DCF model and 40 percent for the CAPM model**.[151]

In AWWU, the "widely different results" between RAPA's CAPM and DCF models were 168 basis points apart. As quoted above, the RCA prefers not to use a single method to estimate the cost of equity, so it did not reject the use of the outlier as it only had two acceptable methods available. A 168-basis point spread was enough to degrade the confidence in the validity of the CAPM model in AWWU and was the basis for the RCA to exercise its discretion to reduce the weight of the more conservative CAPM model in calculating AWWU's cost of equity to only 40 percent. The RCA did this "[w]ithout testimony on an appropriate weighting."[152] The extent of any analytical evidence in that

[151] *Id*. at 33-34 (emphasis added).
[152] *Id*.

record to justify the RCA's action was "the expressed reservations on the CAPM model testified to by [AWWU's expert witness]."[153]

In Order U-07-076(8) the RCA did not give equal weight to the CAPM and DCF methods presented by GHU/CUC and the AG. The RCA stated:

> [I]t is not unexpected that both Moul and Woolridge based their recommendations on essentially the same foundational data and that their differences reflect different ways of looking at the same financial information. We were, however, concerned about the nearly 240 basis point spread which results from the separate analysis of each expert. In this docket, we are placing somewhat more reliance on the CAPM method than the DCF method because it lends itself more readily to adjustment for the small size of GHU/CUC when compared to the data sets presented.
>
> *DCF Model*
> We do not adopt in totality the DCF study results of either Woolridge or Moul. Rather we make adjustments to the DCF model presented by Woolridge as a result of the testimony or our own analysis of the record.[154]
> . . .
> We utilized Woolridge's CAPM study with two adjustments.[155]

The RCA did not quantify the additional reliance it placed on the CAPM in that proceeding. However, the mere existence of a 240-basis point spread in model results utilizing largely the same data was reason enough for the RCA to weight the analysis in favor of one model over another. Ultimately, the RCA's adjustments to the modeling resulted in a DCF of 11.27 percent for the small water utility group and 12.42 percent for the large water utility group,[156] and a CAPM result of 9.7 percent.[157] It appears, based on the figures used to add

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[153] *Id*.
[154] Order No. U-07-076(8) at 64 (GHU/CUC rate case).
[155] *Id*. at 67.
[156] *Id*. at 67.
[157] *Id*. at 69.

the size premiums to GHU/CUC water and wastewater, that the RCA completely disregarded the DCF results.[158]

GHU/CUC are not aware of any regulated water or wastewater utilities in Alaska for which the RCA has set a cost of equity below 7 percent. Even if the M/B result is "not necessarily an incorrect result" despite being a clear statistical outlier, it would still be a highly conservative cost of equity calculation for an Alaska water or wastewater utility. Mr. Blessing's CAPM, DCF, and CE models all produced results contained within a spread of less than 100 basis points. The M/B is over 300 basis points below the next closest model (CAPM), and 425 basis points below the highest result (DCF). This is a substantially greater disparity in modeling results than was the case in AWWU or Docket U-07-076 *et al*. Despite this, Order 21 requires GHU/CUC to grant equal weight to a result that is 300-425 basis points below the other models. By including the M/B and requiring it be given equal weight to the remaining three methodologies Order 21 significantly deflates the ROE determination. This is inconsistent with the RCA's decisions in Order No. U-07-076(8) and Order No. U-08-157(10) for treating even less conservative (yet still questionable) models, and Order Nos. 21 and 26 are silent as to why.

If the M/B result must be included in calculating the cost of equity, then the RCA should have followed its precedent to give less weight to conservative models in a

[158] *Id*. at 70-71 ("Therefore, we allow a size premium adjustment of 100 basis points, bringing our resulting return for the water utilities to 10.7 percent . . . GHU/CUC requested a 1 percent higher return for the sewer utilities than for the water utilities. . .. Therefore we find the cost of equity for the GHU/CUC sewer utilities to be 11.7 percent.").

combined calculation when faced with widely different results between models. Order 21 is silent on weighting, but the "Overall ROE w/o Risk" result found on the table on page 62 clearly shows that the RCA requires GHU/CUC to grant M/B an equal weight to Mr. Blessing's CAPM, DCF, and CE results in the calculations. This is inconsistent with RCA precedent and produces rates that are confiscatory.

Additionally, Order 21 merely states that "an outlying result is not necessarily an incorrect result"[159] despite Mr. Blessing's objections to its use and the significant difference between the M/B result and those of the other three models. This statement in Order 21 is made without any reference or citation to precedent or authority and does not indicate what evidence the RCA relies on for the decision to require GHU/CUC to treat the extremely conservative M/B result as equally persuasive as the other more consistent methods. This 'analysis' contravenes the weighted treatments the RCA chose to impose of its own accord in Order No. U-07-076(8) and Order No. U-08-157(10), and provides no explanation for the RCA's departure from relevant precedent on the treatment of ROE model statistical outliers. Accordingly, this erodes the deference the Court owes to the RCA's decisions on ROE, and the Court should reverse Order Nos. 21 and 26 and remand with instructions to the RCA to adhere to its precedent or to provide an adequate explanation for any departures.

[159] Order 21 at 61 [Exc. 0844; R. 038024].

c. Order 21 erroneously represents that the M/B result is "more accurate."

Order 21 at 60-61 states, "Likewise, GHU and CUC stated their 6.97% Market to Book recalculation was more accurate but ask to exclude it simply due to its outlier status." Order 21 is not clear what the RCA believes GHU/CUC stated its M/B was "more accurate" than. The statement does not include a citation to any part of the record. It appears that Order 21 is claiming that GHU/CUC stated its M/B result was "more accurate" than the results from GHU/CUC's CAPM, DCF, and CE models, but the M/B should be rejected solely because it produces a result that is an outlier in that data set. To the extent the RCA reached this conclusion, GHU/CUC attempted to clarify the record and in the Petition for Reconsideration stated unequivocally that it does not consider Mr. Blessing's M/B result to be an accurate cost of equity result, much less that it is somehow "more accurate" than the results from Mr. Blessing's CAPM, DCF, and CE analyses.[160] Order 26 was silent on this factual error identified by GHU/CUC.

In reviewing the record, GHU/CUC cannot locate a representation that it made that would support the assertion in Order 21 that GHU/CUC stated its M/B 6.97 percent result is "more accurate" than GHU/CUC's other three methods. To the contrary, GHU/CUC rejected it as an outlier.[161] Order 21 erroneously misrepresents GHU/CUC's statements with regards to the accuracy and validity of its M/B result of 6.97 percent, and does not address this error even after GHU/CUC pointed out this factual inaccuracy to the

[160] [Exc. 0851 to 0853; R. 020142 to 020144].
[161] Tr. at 191 (Blessing) [Exc. 0721; R. 020698].

Commission in its Petition for Reconsideration. For these reasons, Order Nos. 21 and 26 should be remanded to the Commission with instructions to correct its inaccurate statement and any conclusions that are drawn based on the inaccuracy.

d. Order 21 applies the wrong standard for GHU/CUC to justify the inclusion of a risk premium.

There is a robust history of RCA decisions recognizing that Alaska utilities face additional risks due to both size and Alaska-specific factors. However, Order 21 states:

> We find that GHU and CUC have failed to support an additional risk premium of 175-basis points. Recently, we have called into question the appropriateness of awarding an additional Alaska-specific risk premium. GHU and CUC did not present objective or quantitative evidence that it faced greater risks, only witness opinion of its relation to proxy group utilities. We are still not convinced that providing service in the State of Alaska presents quantifiable, unaccounted increases to a utility's risk, but here, both witnesses of record agree there is at least 75-basis points worth. We approve a 75-basis point additional risk premium for GHU and CUC.[162]

Order 21 appears to impose a requirement for Alaska utilities to present "objective or quantitative evidence" to demonstrate that they face greater risks due to operating in Alaska. Additionally, Order Nos. 21 and 26 present no Commission analysis to address the risk premium GHU/CUC seek specific to GHU/CUC's small size compared to the proxy group.

Order 21 is the only instance that GHU/CUC can locate where the Commission required the use of "objective or quantitative evidence" to meet its burden of proof on an issue. It is well established that the standard of proof in administrative proceedings is the

[162] Order 21 at 61 [Exc. 0844; R. 038024] (citing to Order No. U-18-043(15) at 85-87).

preponderance of the evidence, unless otherwise stated.[163] For decades, Commission decisions have applied a preponderance of evidence standard for how to determine an appropriate return on equity.[164] There is no statute or regulation that states a different standard of proof should be applied if a utility is seeking a risk premium as part of its cost of equity analysis.

Order 21 states, "However, GHU and CUC did not perform any objective risk analysis or comparisons."[165] To support this statement, the RCA cites to arguments raised by the parties as they relate to location specific risk.[166] While Order 21 recites and references, in part, the quantitative and objective analysis performed by Mr. Blessing regarding size related risk premium justifications, Order 21 presents no Commission analysis of a size-specific premium. As a result, it appears that the 75-basis points approved is based solely on Alaska-specific risk factors, despite the lengthy oral testimony describing risk mitigation mechanisms available to the proxy group that are not available to GHU/CUC.[167] The record shows that these mechanisms were designed for the sole purpose of reducing the financial and business risk faced by the proxy group utilities.

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[163] *Amerada Hess,* 711 P.2d at 1179 n. 14.
[164] Order No. U-75-086(6) (Glacier State Telephone Company tariff revision); Order No. U-16-071(7) at 20 (ACS of Alaska, LLC tariff revision) ("The standard of proof in administrative proceedings is preponderance of the evidence unless otherwise stated." (citing to *Amerada Hess,* 711 P.2d at 1179 n.14)).
[165] Order 21 at 60 [Exc. 0843; R. 038023] (citing to RAPA's Closing Brief at 54-56 [Exc. 0777 to 0779; R. 020023 to 020025] and Tr. at 295-299 [Exc. 0735 to 0739; R. 020834 to 020838]).
[166] *Id*.
[167] Tr. 290-293 [Exc. 0731 to 0734; R. 020829 to 020832].

GHU/CUC's witness testified that seven of the eight proxy group members explicitly discussed risk mitigation mechanisms in their annual reports. Many of these mechanisms are not available to GHU/CUC.[168] Mr. Blessing further described a table found in one proxy group member's annual report that provides a description of some of the mechanisms available to it in the many states in which they operate.[169] For example, the largest member of the proxy group, American Water Works, can use future or hybrid test years in 14 of the 17 states where they operate water/wastewater utilities, accounting for over 85 percent of total corporate revenue. These risk mitigation mechanisms allow known and measurable financial changes that occur after the test year to be used to reduce regulatory lag.[170] GHU/CUC's proposed consumption and plant addition pro forma adjustments would be allowed as a matter of course if such mechanisms were available in Alaska. The fact that such adjustments (and additional adjustments beyond those sought by GHU/CUC) are available to the proxy group members but not to GHU/CUC means that, all else being equal, the risk faced by GHU/CUC exceeds that faced by the members of the proxy group. The lack of access to a full host of risk mitigation mechanisms available to the proxy utilities is objective evidence supported by the record that operating in Alaska results in additional risk relative to the proxy group members. Investors consider these factors and

[168] Tr. 290 [Exc. 0731; R. 020829]. The proxy group annual reports are on the record as Hearing Exhibit H-037 – H-044 [R. 030515 to 031478].
[169] Tr. 291 [Exc. 0732; R. 020830]. The table referenced is found on H-042 [R. 031157].
[170] H-042 [R. 031157].

the likelihood of attaining an authorized return when compared to other investment opportunities.

Even applying the erroneous "objective or quantitative evidence" standard found in Order 21, GHU/CUC met this burden of proof to justify a size-related risk premium in addition to an Alaska-specific risk premium. As Mr. Blessing testified during the hearing:

> . . . the 481 basis points comes from placing the proxy group companies into the decile that they belong and calculating the difference to the lowest decile. Now one thing to remember is the lowest decile is still a whole lot bigger than GHU and CUC, so this is as close as we can get, but 481 basis points is the calculated result.

GHU/CUC also presented evidence showing that the higher realized returns of firms in all industries equivalent in size to the average proxy group members also were less volatile, i.e., less risky, with a standard deviation of 29.5 percent compared with 42.1 percent for firms closer in size to the GHU/CUC utilities.[171] Mr. Blessing provided quantitative evidence using the Duff and Phelps analysis to identify a 481-basis point size related risk premium in publicly traded companies.[172] If a 481-basis point size premium were added to the cost of equity required in Order 21, that would result in 14.58 percent for water and 14.61 percent for wastewater. Because Mr. Blessing recognized this would result in an

[171] T-04 at 45, Table 10 (Blessing Direct) [Exc. 0387; R. 031986]; Tr. at 135 [Exc. 0709; R. 020642].
[172] Tr. at 113 [Exc. 0708; R. 020620], 148-149 [Exc. 0711 to 0712; R. 020655 to 020656], 185-186 [Exc. 0718 to 0719; R. 020692 to 020693], 201 [Exc. 0723; R. 020708] (Blessing); T-04 at 43, 45-46 (Blessing Direct) [Exc. 0385, 0387, 0388; R. 031984, 031986, 031987].

ROE that is an outlier when compared to recent Commission ROE decisions, he adjusted this risk premium to 175 basis points.[173]

The record provides additional objective and quantitative support for Mr. Blessing's approach. Beta is a measure of risk.[174] Using the Value Line betas (which are determined by analysts and published), and taking the difference in the relative risk between the market portfolio of all traded stocks and the proxy group, a measure of relative risk may be developed. There is a difference of 0.34 between the average proxy group beta of 0.66[175] and the market portfolio beta of 1.[176] Multiplying this difference by the 481 additional risk premium from the market sample results in a water/wastewater-specific risk premium of 163.54 basis points. Because the average market capitalization for Decile 10 was 67 percent greater than the total capital of GHU/CUC, the calculated result may be adjusted up to 175 basis points. All the necessary inputs to make this calculation are in the record.[177] Despite all this objective and quantitative evidence in the record to support a size specific risk premium of at least 163.54 basis points, Order 21 does not acknowledge any size related risk premium. Instead, the Commission focuses its scant analysis on Alaska-specific risk factors to find a reason to award a 75-basis point risk premium—while expressly stating that it is unconvinced that operating a utility in Alaska "presents

[173] Tr. at 136 [Exc. 0710; R. 020643] (Blessing).
[174] T-04 at 23 (Blessing Direct) [Exc. 0383; R. 031964].
[175] T-17 at 109 (Parcell, DCP-2 Schedule 8) [Exc. 0669; R. 033647].
[176] T-04 at 23 (Blessing Direct) [Exc. 0383; R. 031964].
[177] *See* GHU/CUC Rebuttal Closing Brief at 53 [Exc. 0783; R. 020088]; T-17 at 109 (Parcell Exhibit DCP-2, Schedule 8) [Exc. 0669; R. 033647]; T-04 at 23 (Blessing Direct) [Exc. 0383; R. 031964].

quantifiable, unaccounted increases to a utility's risk."[178] However, also in Order 21, when addressing the cost of energy adjustment the RCA stated, "between the weather and geography of Fairbanks, we find that the uniqueness of serving Fairbanks and North Pole can have meaningful and unavoidable effects on GHU and CUC's costs."[179] This is in direct conflict with the RCA's stated skepticism of the need for an Alaska-specific risk premium. The meaningful and unavoidable effects on GHU/CUC's costs due to the uniqueness of serving in Fairbanks and North Pole are the same reasons for why GHU/CUC merits an Alaska-specific risk premium independent of and separate from a size-specific premium.

GHU/CUC established by a preponderance of the evidence that a size-related risk premium is appropriate for GHU/CUC. GHU/CUC also established by objective and quantitative evidence that the appropriate size-specific risk premium for GHU/CUC is at least 163.54 basis points. Order 21 relies on an incorrect standard by which GHU/CUC needed to meet its burden of proof to establish a reasonable size premium, and is therefore erroneous, unlawful and defective. Additionally, even if the erroneous and novel "objective and quantitative evidence" standard is applied, the conclusion reached in Order 21 does not reflect the evidence in the record and does not logically flow from an application of that standard.

[178] Order 21 at 61 [Exc. 0844; R. 038024].
[179] *Id*. at 21 [Exc. 0804; R. 037984].

The reduction of the requested 175 basis point risk premium to 75 basis points added to the ROE decreases GHU/CUC's annual revenue requirements by approximately $249,899 for water and $322,396 for wastewater. This demonstrates a significant, unjustified impact to GHU/CUC's opportunity to earn a fair and reasonable return on its investment, and it can be directly attributed to the unlawful standard of review by which Order 21 required GHU/CUC to meet its burden of proof.

e. Order 21 does not adhere to RCA precedent regarding risk premiums.

Order 21 states that "we are still not convinced that providing service in the state of Alaska presents quantifiable, unaccounted increases to a utility's risk."[180] To support this statement, Order 21 cites to Order No. U-18-043(15) at 85-87 in a recent Cook Inlet Natural Gas Storage Alaska ("CINGSA") docket.[181] But, as discussed above, Order 21 does not address the Commission orders that recognize the validity of awarding an Alaska-specific risk premium to regulated utilities in various industries. Further, the amount of the 75-basis point Alaska-specific risk premium approved in Order 21 is significantly below that which has been awarded by the Commission to GHU/CUC and other utilities in prior proceedings. Additionally, Order 21 does not address GHU/CUC's arguments clearly distinguishing the facts and circumstances in this proceeding from the Commission's decision to not grant an Alaska-specific risk premium to CINGSA in Order No. U-18-043(15).

[180] *Id*. at 61 [Exc. 0844; R. 038024].
[181] *Id*.

Below is a discussion of how Order 21's risk premium analysis and approval is inconsistent with Commission precedent.

i. GHU/CUC Order Nos. U-00-115(13) *et al.*, U-05-043(15) and U-07-077(8).

The Commission has consistently allowed GHU/CUC to use risk premiums that exceed the 75-basis points permitted in Order 21. In Order No. U-00-115(13) *et al.*, the Commission applied a 200-basis point risk premium to the ROE to compensate for the risks faced by GHU/CUC, including risks due to size and location, expressly stating "We find that a one percent risk premium is too low given the risks to this utility."[182] In Order No. U-05-043(15), the Commission granted a 150-basis point risk premium to GHU/CUC's water ROE and a 250-basis point risk premium to GHU/CUC's wastewater utility, stating:

> While our decision draws upon Woolridge's recommendation of 9.2 percent, we still believe that it is appropriate to add to this recommendation in light of the unique risks faced by these utilities. First we find that the extreme climatic conditions encountered in Fairbanks and the unique operating requirements necessary to address that extreme climate justify an additional component to return on equity. Second, we note that stock in these utilities is not publicly traded and that due to the remoteness of the utilities there is a lack of a ready market to facilitate buying and selling of interests in these utilities. These circumstances result in a barrier to investment over comparable utilities in the lower forty-eight states.[183]

In Order No. U-07-076(8), the Commission found an insufficient record to rely on the information provided by GHU/CUC's witness supporting a risk premium between 176 and 388 basis points.[184] Nonetheless, the Commission still found it appropriate to "allow a size

[182] Order No. U-00-115(13) *et al.* at 16 (GHU/CUC rate case).
[183] Order No. U-05-043(15) at 49-50 (GHU/CUC rate case).
[184] Order No. U-07-076(8) at 70 (GHU/CUC rate case).

premium adjustment of 100 basis points . . . for the water utilities."[185] In addition to the size premium it allowed for the water utilities, the Commission also found it appropriate to award an additional 200 basis point premium to the return on equity for wastewater due to the "hazardous and potentially toxic substances" and because "[t]he sewer utilities face greater regulation and environmental dangers."

The Commission in each of GHU/CUC's adjudicated rate cases over the past 20 years has consistently granted GHU/CUC risk premiums in the 100-250 basis point ranges. The Commission's justifications in each of those dockets rely on the same factors as those faced by GHU/CUC today. GHU/CUC still operate water and wastewater utilities in Fairbanks, Alaska. Fairbanks, Alaska continues to be the coldest city in the United States. GHU/CUC are still far smaller than any reasonable proxy group used to analyze ROE. Wastewater still contains hazardous and potentially toxic substances (such as PFAS), and wastewater utilities still face greater regulation and environmental dangers compared to water utilities. GHU/CUC have shown in the record of this proceeding by a preponderance of the evidence that a risk premium of approximately 175-basis points is reasonable, and that it is also objectively quantifiable based on the record to reach a size related risk premium of at least 163.5 basis points.

The risk premium analysis in Order 21 is inconsistent with RCA precedent in GHU/CUC rate cases, and the RCA failed to adequately explain this departure. As stated above, allowing orders to deviate from precedent creates regulatory uncertainty. Such a

[185] *Id*.

deviation from established precedent is erroneous, unlawful, or otherwise defective and Order 21 should be remanded to align the risk premium analysis with RCA precedent or to adequately explain why the RCA is declining to do so in this case.

ii. CINGSA Order No. U-18-043(15)

The Commission's decision to not grant an Alaska-specific or size risk premiums to CINGSA in Order No. U-18-043(15) bears no value in an analysis to determine whether such a premium should be granted to GHU/CUC. Order 21's citation to the CINGSA order creates unnecessary uncertainty in how to interpret Commission precedent on this issue.

CINGSA is a highly unusual utility. The primary distinction between CINGSA and GHU/CUC that Order 21 fails to acknowledge, despite GHU/CUC raising this issue repeatedly in this docket, is that CINGSA has "take or pay" contracts covering 99 percent of its revenue requirement for the next 14 years.[186] In other words, 99 percent of the revenues that CINGSA needs to operate and earn a reasonable return are guaranteed regardless of CINGSA's customers actual use of the utility service. GHU/CUC do not have such absolute certainty for future revenues as the post-test year earnings statements filed with the RCA during the hearing confirm.[187] Importantly, the Commission in the CINGSA order still noted that CINGSA's small size relative to the proxy group could

[186] T-05 at 28 (Blessing Reply) [Exc. 0691; R. 032046]; GHU/CUC Closing at 25-26 [Exc. 0774 to 0775; R. 019927 to 019928].
[187] H-045 to H-048 [Exc. 0392 to 0655; R. 031479 to 031742] (showing that GHU/CUC's realized return was more than 400 basis points below the allowed return for both combined water and combined sewer operations).

"create unusual economic risks,"[188] but it declined to include an additional risk premium because of the take or pay contracts.[189] While GHU/CUC are similarly small relative to their proxy group, GHU/CUC do not have guaranteed revenues.

iii. ENSTAR Order No. U-16-066(19).

Order No. U-16-066(19) from a recent ENSTAR docket was raised throughout the proceeding at the RCA as evidence that the Commission precedent supports the award of Alaska-specific risk factors. In that order, the Commission stated:

> (6) Geographic isolation and small size
>
> ENSTAR argues that Alaska tends to be a higher cost environment due to its geographic isolation, due to increased material shipping costs, and longer procurement times. ENSTAR asserts that this multiplies the impacts of the "size effect" experienced by smaller firms. We agree that both geographic isolation and ENSTAR's smaller size increase risk.[190]

Just like ENSTAR, GHU/CUC argued that its geographic isolation and higher cost environment due to increased material shipping costs and longer procurement times support an Alaska-specific risk premium compared to the proxy group.[191] The same reasons that ENSTAR argued that these Alaska-specific risks multiply the impacts of the "size effect" likewise apply to—and were raised by—GHU/CUC.[192]

ENSTAR's shipping costs and delays cannot be somehow worse or riskier than those same risks faced by GHU/CUC in Fairbanks. Unlike ENSTAR, GHU/CUC is not

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[188] Order No. U-18-043(15) at 85 (CINGSA natural gas storage rate case).
[189] *Id.*
[190] Order No. U-16-066(19) at 52 (ENSTAR rate case).
[191] T-05 at 10 (Blessing Reply) [Exc. 0687; R. 032028].
[192] T-05 at 4, 20 (Blessing Reply) [Exc. 0685, 0689; R. 032022, 032038].

located in proximity to multiple seaports which reduces ENSTAR's costs and delays for shipping parts and equipment for maintenance and improvements compared to GHU/CUC. GHU/CUC is more geographically isolated than ENSTAR and operates in a higher cost environment due to that isolation. ENSTAR also argued that "declining use per customer and lack of a revenue stabilization or decoupling mechanism increase ENSTAR's risk."[193] Even though the record in Docket U-16-066 "did not present a comprehensive discussion of this factor relative to the mechanisms in place, or lack thereof, for the respective proxy groups" the Commission still found that "this factor increases ENSTAR's risk."[194]

The RCA acknowledged, and sympathized, that GHU/CUC have declining consumption—and there is evidence in the record for projected declines based on more than 20 years of prior declines as well as the actual data showing consumption declines in the 2019 and 2020 rate years.[195] GHU/CUC addressed the relative availability of such mechanisms as discussed by Order No. U-16-066(19) between GHU/CUC and the proxy group.[196]

Because the Commission found that declining consumption for ENSTAR "increases ENSTAR's risk" then the same should also be true for GHU/CUC. For ENSTAR, the Commission reflected the consumption related risk into ENSTAR's overall risk premium. In the absence of some mechanism to account for GHU/CUC's declining use per

[193] Order No. U-16-066(19) at 51 (ENSTAR rate case).
[194] *Id*.
[195] H-060 [Exc. 0754; R. 031838]; Order 21 at 30 [Exc. 0813; R. 037993]; Tr. 432-436 [Exc. 0744 to 0748; R. 020998 to 021002]; H-060 [Exc. 0754; R. 031838].
[196] Tr. 291 [Exc. 0732; R. 020830].

customer,[197] Commission precedent supports an increase to the risk premium in the ROE to fairly compensate the utility for this risk. Order 21 does not do so.

Order 21 directly contradicts its precedent on the validity of Alaska-specific risk recognized in Order No. U-16-066(19), and then arbitrarily selects 75-basis points for an additional risk adjustment. This does not constitute adequate reasoning based in the record for the RCA's decision. Order 21 creates undesirable regulatory uncertainty, leaving utilities, ratepayers, and courts to wonder which way the panel will decide in future proceedings. Will the Alaska-specific risk premium outcomes in future proceedings reflect the reasoning of the panel in ENSTAR's case (and other prior decisions) recognizing the validity of this risk, or will those outcomes follow the unfounded skepticism laid forth in Order 21? Such uncertainty was recognized as poor public policy by this Court in *AVCG*.[198] The uncertainty is exacerbated by the RCA failing to provide adequate reasoned analysis explaining this change in position. This is precisely why the RCA must either follow its precedent or explain its departure.[199] It may also constitute unlawful discrimination in how the Commission chooses to handle substantially the same issue for different utilities.[200]

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[197] Because the pro forma consumption adjustment sought by GHU/CUC was rejected in Order 21, no such consumption mechanism is in place to mitigate this risk.
[198] *AVCG,* 527 P.3d at 286.
[199] *Amerada Hess*, 176 P.3d at 685.
[200] *Baltimore Gas,* 954 F.3d at 283 (remanding because the FERC was more permissive with several other similarly situated utilities, but failed to explain the disparate treatment of the appellant utilities filings).

iv. AELP Order U-10-029(15).

In Docket U-10-029, Alaska Electric Light and Power Company ("AELP") sought a risk premium of 350 basis points due in part to its small size compared to the proxy group, exposure to losses from avalanches and mud slides, and "a perception by investors that Alaska utilities have greater business risks."[201] AELP's expert witness performed a size-premium analysis using Morningstar study reports for each of the 10 portfolios (deciles), that was substantially similar to what Mr. Blessing provided here. Mr. Parcell provided cost of equity testimony on behalf of RAPA in the AELP proceeding. In that case, just as he did here, Mr. Parcell tried to account for any Alaska-specific or size related risk premium by using his high DCF results.[202] As stated by the Commission in Order No. U-10-029(15):

> Parcell did, however consider AEL&P somewhat riskier than the proxy companies. He did not choose to recognize that risk by adding an explicit basis-point adjustment to the cost of equity. His ROE recommendation contained an implicit risk adjustment, he testified, because he used the highest growth rates in his DCF analysis and because he recommended the high end (11 percent) of his equity range.[203]

[201] Order No. U-10-029(15) at 33 (AELP rate case). GHU/CUC note that as cited to in Order No. U-10-029(15) at 33 n. 213, AELP's witness calculated a 443 basis point size premium based on the entire proxy group, but was able to isolate an 88 basis point premium related specifically to the 31 electric utilities in the proxy group, and removed 5 basis points from his recommendation to be conservative and reach his calculation of 350 basis points. GHU/CUC had no such ability to similarly isolate any water utility specific impact in the relevant deciles due largely to the small sample size of publicly traded water companies.
[202] *Id*. at 34.
[203] *Id*. at 35.

To summarize, AELP's expert conducted a very similar risk premium analysis as that performed by Mr. Blessing here, and RAPA's expert, Mr. Parcell, used the same implicit risk approach by using the high end of his equity results for both AELP and GHU/CUC.

For AELP, the Commission granted a 162.5 basis point risk premium. In support of this finding, the Commission concluded:

> Based on our review of the experts' testimony and all of the other evidence in the record concerning the finances and operations of AEL&P, we conclude that AEL&P is riskier than the proxy utilities. However, we decline to accept that recognizing that risk requires an adjustment of 350 basis points. Conversely, we do not believe that adopting the upper end of the range of ROE analyses in this case, without an explicit adjustment, would adequately compensate AEL&P for its greater risk.[204]

In other words, the Commission (1) recognized the validity of size and Alaska-specific risk premiums; (2) rejected the objective and quantifiable risk premium of 350 basis points that was supported in the record by AELP as being too high, and set a 162.5 basis point risk premium based on the belief of the Commission; and (3) rejected Mr. Parcell's 'implicit' risk premium as being inadequate to compensate for AELP's greater risk due to size and location in Alaska.

Here, Mr. Blessing's proxy analysis provided a 481-basis point objective and quantitative analyses for a risk premium, akin to AELP's unadjusted 443-basis point analysis. GHU/CUC and AELP are both Alaska utilities that are similarly undersized relative to the respective proxy groups used. Unlike AELP, Mr. Blessing could not isolate any water utility specific impacts in the size premium analysis. In the absence of that

[204] *Id*. at 37.

option, Mr. Blessing used reasoned judgment and reduced his recommendation to be within the range of other Commission risk premium decisions—including Order No. U-10-029(15). The evidence in the current record also provides an objective and quantitative means of justifying the appropriateness of at least a 163.54 basis point size risk premium as described above. Finally, Mr. Parcell raised the same arguments and provided the same implicit risk premium method in GHU/CUC's rate case as was rejected in Order No. U-10-029(15).

Despite all the similarities of fact and analysis between Order No. U-10-029(15) and Order 21, Order 21 reaches a starkly different conclusion. Order 21 disputes the need for any Alaska-specific risk premium, is silent on a size related risk premium, and accepts the so-called implicit risk premium of 75-basis points that was derived by Mr. Parcell. This is a direct contradiction of relevant Commission precedent without any explanation for the departure. The RCA should not be allowed to be inconsistent in their treatment of similarly situated entities in ratemaking.

f. The Result of Order 21 ROE violates *Hope* and *Bluefield.*

For nearly a century, the U.S. Supreme Court's ruling in *Bluefield* has been the bedrock of utility ratemaking nationwide.[205] The Court in *Bluefield* held:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general

[205] 262 US 679 (1923).

> part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.[206]

In *Hope*, the Court held, "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[207]

For the reasons outlined above, the inconsistencies between Order Nos. 21 and 26 and other Commission precedent result in a cost of equity that is improperly suppressed and does not reflect a fair return upon GHU/CUC's investments. A cost of equity determination of 9.81 percent, that is based in part on Mr. Blessing's outlying result from his M/B analysis does not represent a return on equity that is commensurate or equal to the returns on equity for the majority of the proxy group—let alone GHU/CUC. The Commission's reliance on an "implicit" 75-basis point risk premium that Mr. Parcell stated was included "just to be conservative and give some consideration to what might be construed to be any risk associated to being a lesser company or smaller firm"[208] is contrary to Commission precedent, and results in an ROE for GHU/CUC that does not permit GHU/CUC to earn a return on its investment that is adequate relative to the risks it faces.

Based on Order Nos. 21 and 26, it is clear that the Commission had reservations with some aspects of the theoretical models relied upon by GHU/CUC to support its proposed ROE. But allowing perfection to be the enemy of the good is a real danger posed by Order Nos. 21 and 26. In *Hope*, the Court held, "[i]t is not theory but the impact of the

[206] *Id.* at 692-93.
[207] *Id*. at 603.
[208] Tr. at 251 [Exc. 0729; R. 020790].

rate order which counts."[209] GHU/CUC are not posturing or making hyperbolic claims when they state that the ROE impacts of Order 21, result in rates that are unsustainable for the operation of the utilities. Based on its 2019 annual reports filed with this Commission, GHU/CUC significantly under-earned—6.12 percent compared with an allowed ROE of 11 percent for the combined wastewater operations, and 6.24 percent compared with an allowed ROE of 10.7 percent for the combined water utilities—even with the interim rate increase in effect. The under-earnings continued and worsened through 2020, to approximately 3.8 percent for wastewater and 2.8 percent for water as shown in GHU/CUC's annual reports publicly available through the RCA. For clarity, these preliminary under-earnings were calculated based on the interim and refundable rates, and do not include the impacts from Order 21. Any refund liability from a final order in this proceeding would further erode GHU/CUC's achieved ROE for each utility.

Order 21 requires the use of a ROE that violates the longstanding doctrines established in *Hope* and *Bluefield*. As such, Order 21 is erroneous, unlawful, or otherwise defective and requires reconsideration to correct the inconsistencies in the ROE analysis and establish an ROE that is appropriate for GHU/CUC under *Hope* and *Bluefield*.

C. ORDER 21 WILL CAUSE GHU/CUC TO UNDER-RECOVER USED AND USEFUL PLANT THAT IS PROVIDING BENEFITS TO RATEPAYERS.

The used and useful standard is the ratemaking standard required by AS 42.05.441(b) when considering what plant investments a utility may include in its rate

[209] *Hope*, 320 U.S. at 602.

base. There is no dispute that GHU/CUC's investments in the Chena Marina Extension and screening system were used and useful, and that the costs were known and measurable in the test year.[210] There is also no dispute that the sewer treatment plant clarifier and influent pump were used and useful, with known and measurable costs, prior to GHU/CUC filing this rate case.[211] No party attempted to rebut the presumption that GHU/CUC's investment in this plant was prudent. Order 21 states that the next step in the analysis for annualizing mid-test-year plant additions then requires the Commission to "balance [] approval or disallowance of the annualizing pro forma adjustments in light of the benefit of the plant to ratepayers."[212]

Again, the Court in *Hope* held, "[i]t is not theory but the impact of the rate order which counts."[213] The Commission's two-step analysis, adding the balance of the benefit of the plant to ratepayers, appears to be applied to GHU/CUC in a manner that prioritizes the form of the theory over the function of its actual impacts. Here, the impact of denying the pro forma plant adjustments is substantial. Below is a table containing GHU/CUC's preliminary calculations of the impacts of Order 21's denial of each of the proposed plant adjustments to the revenue requirement in isolation:

Plant Adjustment	**Utility**	**Investment**	**RR Impact**
Chena Marina	Water	$ 1,670,341	$ (141,016)
Fine Screening System	Sewer	$ 1,938,588	$ (240,781)
Clarifiers	Sewer	$ 975,568	$ (128,219)

[210] Tr. at 665 [Exc. 0769; R. 021279].
[211] *Id*.
[212] Order 21 at 46 [Exc. 0829; R. 038009] (quoting Order No. U-16-066(19) at 25).
[213] *Hope*, 320 U.S. at 602.

Influent Pump	Sewer	$	153,842	$	(20,220)
Total		**$**	**4,738,339**	**$**	**(530,235)**

In other words, ignoring all of GHU/CUC's other arguments, remanding Order 21 with instructions to permit the annualization of just the screening system represents a $240,781 impact to the annual wastewater revenue requirement. And the same comparison can be drawn for each of the other proposed plant additions. Cumulatively, Order 21's denial of these pro forma plant adjustments decreases GHU/CUC's combined annual revenue requirement by at least $530,235, and represents a large portion of the potential refund liability faced by GHU/CUC.

In Order No. U-06-045(7), the Commission stated, "[w]e review a utility's rates to strike the appropriate balance between the ratepayer's interest in paying the lowest reasonable rates and the utility's interest in adequate revenues and a return to shareholders."[214] In Order No. U-00-088(12), the Commission stated:

> The goal of cost-based ratemaking is not to recover past costs, but to predict the rates necessary to produce revenue adequate to cover the utility's costs and provide a reasonable return on investment during the future period when the rates are likely to be in effect.[215]

The goal of Order 21 should have been to produce revenues adequate to cover the utility's costs and provide a reasonable return on its investment during the rate years. It did not.

[214] Order No. U-06-045(7) at 4-5 (AWWU rate case) (citing to Order No. U-00-088(12) at 4 (ENSTAR rate case)).
[215] Order No. U-00-088(12) at 4-5 (ENSTAR rate case).

1. Order 21 incorrectly applies Commission precedent in analyzing the facts in this case.

The analysis in Order 21 provides a simple comparison between each of GHU/CUC's proposed pro forma plant additions and pro forma plant additions of other utilities in past dockets. This superficial assessment results in conclusions that are erroneous or otherwise deficient by overlooking vital information from the record that demonstrates that GHU/CUC's proposed pro forma plant additions are analogous to past Commission decisions that approved similar mid- and post-test year plant adjustments.

a. Screening System

Order 21 acknowledges that "GHU and CUC's new screening system arguably enhances the system."[216] But it more than "arguably" enhances the system—and the preponderance of the evidence in the record demonstrates that the finer mesh screening system enhances the safety and reliability of the system. This is a direct benefit to ratepayers. GHU/CUC believe that Order 21 correctly drew a parallel between the finer mesh screening system and the ENSTAR additions in Order No. U-16-066(19). The RCA is incorrect that GHU/CUC "did not differentiate the ratepayer benefit of the [finer mesh] system above and beyond what would occur with normal maintenance associated with prudent utility practice."[217] Finally, Order 21 does not address the relative size impact of the screens to GHU/CUC's rate base compared to other annualized mid-test year plant adjustments that the Commission has allowed.

[216] Order 21 at 48 [Exc. 0831; R. 038011].
[217] *Id*.

On reconsideration, the RCA did not address GHU/CUC's arguments demonstrating from the record that the screening system did in fact provide benefits to ratepayers beyond that of normal maintenance. Instead, in Order 26, the RCA provided a new justification for its decision to deny the pro forma adjustment for the screening system:

> In regard to the screening system, in this instance, we continue to find that GHU and CUC did not thoroughly address synchronization issues surrounding its new screening system.[218]

The RCA cannot "continue to find" an issue persists in Order 26 when that same issue was not identified or raised as the RCA's concern in its previous decisions for the screening system adjustment. Furthermore, this justification is hollow and unreasonable. As stated in the Dissenting Statement of Commissioners Pickett and Wilson:

> We both disagree with the decision in Order U-19-070(21) to deny an annualizing adjustment for the addition of a fine screening system. We would grant reconsideration and allow the annualizing adjustment. The addition was placed in service before the end of the test year, will be in service during the time rates are in effect, and benefits ratepayers. Although the record is not well developed on synchronization, we find it reasonable to conclude that addition of the screening system is unlikely to result in changes elsewhere in the revenue requirement.[219]

There are no revenues associated with the finer mesh screening system, and so Commissioners Pickett and Wilson are correct in finding that synchronization issues are unlikely to impact the revenue requirement. The RCA's finding in Order 26 that GHU/CUC's failure to address nonexistent synchronization issues is irrelevant, not record based, and should be disregarded. GHU/CUC do not have an obligation to address

[218] Order 26 at 9 [Exc. 0884; R. 038038].
[219] Dissenting Statement to Order 26 at 2-3 [Exc. 0891 to 0892; R. 038045 to 038046].

hypothetical problems with pro forma adjustments that do not actually exist and were not raised at any time by any party or the RCA until in an order on a petition for reconsideration of the final order in the proceeding.

Order 21's finding that the new screening system was routine maintenance is factually wrong and not supported by the record. The finer mesh screening system was not installed because it was the end of the useful life of the former screens. To the contrary, the prior screening system had useful life remaining, and so it could not have been replaced by the finer mesh screening system as a matter of "normal maintenance associated with prudent utility practice." Ms. Merrill testified that GHU/CUC and other wastewater companies nationwide have recently experienced a shift in customer behavior to use "disposable" and "flushable" wipes (referred to in the rate case as "rags") more commonly than before.[220] These rags create serious, or even catastrophic operational problems if they are allowed to enter the wastewater treatment plant, all of which leads to increased maintenance expenses. By using a screening system with smaller diameter holes, fewer rags are able to enter the wastewater treatment plant and cause problems, thus improving its ability to operate reliably.

The preemptive replacement of the screens with finer mesh was not maintenance driven but was a reactive investment by the utility to address a change in consumer behaviors recognized to be occurring nationwide and to improve system reliability. The finer mesh screening system has led to direct benefits to customers in terms of decreased

[220] T-06 at 14-15 (Merrill Direct) [Exc. 0004 to 0005; R. 032090 to 032091].

maintenance costs and improved reliability of the wastewater treatment plant, even if these benefits are not directly identified and tracked by the utility. Failure to allow an annualization adjustment for such a beneficial and significant investment in plant results in a poor public policy outcome where utilities have no regulatory incentive to proactively seek improvements to plant that will improve reliability and decrease maintenance expense. Had this fine mesh screening system not been installed until the end of the useful life of the former system, rate payers would have been stuck paying for higher maintenance costs—an operating expense that would be routinely recoverable in rates—while being more susceptible to a catastrophic failure of their wastewater system which would result in interruption of service (along with any resulting public health consequences).

Just like the annualizing pro forma adjustments approved for ENSTAR, the improvements to safety and reliability from the finer mesh screening system provide benefits that under the balancing analysis in Commission precedent warrant approval of the pro forma annualization adjustment. Order 21 misrepresents the facts in the record to reach the incorrect conclusion that the fine mesh screening was "normal maintenance." This penalizes GHU/CUC for acting prudently to improve the safety and reliability of the wastewater system while reducing maintenance expenses.

Order 21 does not address or acknowledge the financial magnitude comparisons that GHU/CUC made in the record to demonstrate the impact of installing the finer mesh screening system as compared to other projects that the Commission approved as pro forma plant adjustments. This is important as the RCA has pointed to the size (cost of the addition

as compared to total plant investment) of the addition being a primary factor for a utility to bring a rate case, to justify a pro forma adjustment to the test year for that plant addition.[221] This is a crucial component to weigh the impacts of the decision on the utility and ratepayers, as it represents the impact to a utility's rate base recovery relative to its overall size for a specific adjustment to plant in rate base. The finer mesh screening system was comparably sized to many other pro forma plant adjustments approved by the RCA in prior cases as shown in Attachment B to GHU/CUC's Petition for Reconsideration.[222]

As stated previously, Order 21 compares the finer mesh screening system to ENSTAR's additions approved in Order No. U-16-066(19). As shown below, GHU/CUC's finer mesh screening system represented a larger addition to GHU/CUC's gross and net plant than did any of ENSTAR's pro forma adjustments:[223]

	GHU/CUC Finer Screening System	**ENSTAR Potter Gate & Burnt Island**	**ENSTAR Beluga River**	**ENSTAR ERT**
Percent Addition to Gross Plant	2.19%	0.57%	0.45%	0.84%
Percent Addition to Net Plant	3.80%	1.18%	0.92%	1.73%

[221] Order No. U-10-029(15) at 28 (AELP rate case); Order No. U-08-157(10) at 27-28 (AWWU rate case); Order No. U-16-066(19) at 26-27 (ENSTAR rate case).
[222] [Exc. 0397; R. 000875] contains a table summarizing data from the record in this proceeding and publicly available data from the ENSTAR, AWWU, and AELP precedent recited in Order 21 at 39-47 [Exc. 0822 to 0830; R. 038002 to 038010] by the Commission to provide guidance on addressing annualizing adjustments and post-test year additions.
[223] [Exc. 0397; R. 000875].

GHU/CUC's finer mesh screening system represents a 260—487 percent larger addition to GHU/CUC's gross plant than any one of ENSTAR's adjustments and a 33 percent larger addition than ENSTAR's adjustments cumulatively. The impact disparities become even greater when comparing the cumulative results of GHU/CUC's wastewater system proposed adjustments to the three combined ENSTAR adjustments in an apples-to-apples analysis.

The 4th Circuit Court recently reiterated in *Consolidated Edison Company of New York, Inc. v. FERC* that "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases."[224] In *Consolidated Edison* the utility disputed the FERC's decision to require a particular cost assignment method for certain projects in the past but denied the use of that methodology for similar projects in the proceeding on appeal. In rejecting the FERC's explanation for its decision, the Court stated:

> FERC could not rationally explain its decision to treat Bergen and Sewaren differently from Artificial Island by simply pointing to its earlier finding that "stability is analytically unique compared to voltage or thermal overload problems." Instead, FERC needed to explain why stability is "analytically unique" *compared to short-circuit issues*.[225]

[224] *Consolidated Edison Co. of New York, Inc. v. F.E.R.C.*, 45 F.4th 265, 279 (D.C. Cir. 2022) (quoting *Westar Energy, Inc. v. F.E.R.C.*, 473 F.3d 1239, 1241 (D.C. Cir. 2007)) ("*Consolidated Edison*").

[225] *Id.* at 80 (emphasis in the original).

In the current matter, the RCA failed to treat like cases alike. Despite the recognized parallel to ENSTAR in Order No. U-16-066 and the larger impact on GHU/CUC's rates compared to ENSTAR, Order 21 is silent on the relative size of the screening system costs to gross plant. Order 21 then finds that GHU/CUC's fine mesh system does not justify the same treatment that was approved by the Commission for ENSTAR in Order No. U-16-066(19) based on it being "routine maintenance." If the cost expenditure of GHU/CUC's new screening system was several times larger than the ENSTAR improvements, which were not considered routine maintenance based largely on the financial size of the projects compared to gross plant, it is inconsistent for the RCA to determine GHU/CUC's screens were "routine maintenance" without any discussion of the relative size impacts. And neither Order 21 nor Order 26 explain why the magnitude of GHU/CUC's screening system pro forma adjustment is distinguishable from its reliance on that factor in Order U-16-066(19) for ENSTAR's pro forma adjustment.

Even considering the fact-specific nature of pro forma plant adjustment analysis, Order 21 is inconsistent with prior Commission precedent, including one of the prior commission decisions that Order 21 expressly states is "much like" the current proceeding on this issue. Orders 21 and 26 provide shifting rationales for the rejection of the pro forma adjustment for the screening system and do not provide adequate explanation for why GHU/CUC's proposed adjustment should be treated differently than similar adjustments that the RCA has approved in the past.

b. Chena Marina Extension

GHU/CUC proposed a $1,670,341 addition as an annualizing pro forma adjustment to reflect an extension that serves new customers at the Chena Marina which was placed into service during the test year in September 2018. Order 21 provides little insight into how the decision to deny GHU/CUC's pro forma annualization adjustment for the Chena Marina extension was reached. Order 26 provided no additional explanation for denying the pro forma adjustment for the Chena Marina extension. Order 21 vaguely states:

> In all of the relevant cases cited above, the adjustment must be for plant primarily built to benefit ratepayers. This Chena Marina extension was built primarily to serve new customers. Any benefits to the system as a whole were side effects.[226]

Order 21's decision to deny the annualization pro forma adjustment for the Chena Marina extension is erroneous, unlawful, or otherwise defective because: 1) Order 21 arbitrarily discriminates between different segments of GHU/CUC's ratepayers; and 2) Order 21 is inconsistent with relevant Commission precedent.

The language addressing the Chena Marina extension in Order 21 draws a distinction between "ratepayers" and "new customers." GHU/CUC cannot locate any Commission precedent to support the use of such an arbitrary distinction in any portion of ratemaking, much less as might apply to a plant in rate base adjustment analysis. None of the orders quoted or cited by the Commission in Order 21 delineate between benefits to "ratepayers" and "new customers." The closest analysis taking new customers into account

[226] Order 21 at 48 [Exc. 0831; R. 038011].

that GHU/CUC can identify is in Order No. U-08-157(10) where the Commission restated AWWU's representation that there was not a synchronization issue "since the project does not involve service to new customers or allow for any substantial cost savings."[227] This is a recitation of fact as stated by a party, and is not analysis, precedent, or jurisprudence issued by the Commission. As such, Order No. U-08-157(10) cannot be construed as the Commission weighing the distribution of benefits between "new customers" and "ratepayers" as part of its decision to disallow or approve a pro forma adjustment. Additionally, it was not raised as a disqualifying fact for a proposed pro forma adjustment, but rather highlights why there was not additional discussion or adjustments to account for synchronization in AWWU's proposed adjustment. Regardless, GHU/CUC properly synchronized the pro forma adjustment by annualizing the new revenues related to the Chena Marina extension.

A public utility has a statutory obligation to not discriminate in providing services to its customers, or in the rates that it charges for services.[228] It is also a statutory condition of issuance for a certificate of public convenience that the utility provide service to the public throughout its service area, provided that such service does not require an unreasonable investment in facilities.[229] There is no challenge in the record to GHU/CUC's presumption of prudence for the decision to construct the Chena Marina extension. It is not reasonable to claim that the benefits provided to the customers served by the Chena

[227] Order No. U-08-157(10) at 26 n. 134 (AWWU rate case).
[228] AS 42.05.301; AS 42.05.391.
[229] AS 42.05.241; AS 42.05.301.

Marina extension are not benefits to ratepayers. There is no functional or valid legal difference between existing and new ratepayers in ratemaking—there are only ratepayers. Water quality in the area was poor and some residents' wells were failing.[230] The extension of utility water service provides an affordable and safe alternative to water hauler/bulk fill services to those residents.[231] Also, the Chena Marina extension provides ratepayers with reliable and sufficient water system pressure for general service reliability.[232] Finally, the Chena Marina extension provides a new connection for fire departments to use for emergency response without having to travel outside the area, improving the general public safety and welfare.[233] All of these things are benefits enjoyed by ratepayers and the general public in that portion of GHU/CUC's service area attributable to the Chena Marina extension.

As was raised throughout the proceeding, the Chena Marina extension is analogous to the AWWU water loop adjustment approved in Order No. U-08-157(10). The Chena Marina extension and AWWU water loop were both placed into service during the test year and were used and useful. GHU/CUC and AWWU both properly addressed potential synchronicity issues by annualizing the revenues associated with the Chena Marina and the water loop.[234] The Commission has in many cases analyzed the size of the proposed plant

[230] T-06 at 14-15 (Merrill Direct) [Exc. 0004 to 0005; R. 032090 to 032091]; T-09 at 36 (Wilks Reply) [Exc. 0702; R. 032316].
[231] *Id*.
[232] T-09 at 37 (Wilks Reply) [Exc. 0703; R. 032317].
[233] *Id*.
[234] *Id*. at 36-37 [Exc. 0702 to 0703; R. 032316 to 032317]. Additionally, Order 21 does not take issue with GHU/CUC's synchronization of revenues from the Chena Marina.

adjustment relative to the utility's rate base as part of its balancing test. As shown on Exc. 0875, the Chena Marina extension is well within the size impact ranges of other adjustments approved by the Commission.

Based on factually analogous precedent, GHU/CUC demonstrated by a preponderance of the evidence in the record that the Chena Marina extension merits approval of an annualized pro forma adjustment to plant included in rate base. Additionally, under *Hope*, the overall impact to rates from denying the proposed adjustment is relevant to the balancing analysis. Based on GHU/CUC's preliminary calculations, Order 21 reduces GHU/CUC's annual revenue requirement by at least $141,016 that is solely attributable to the denial of the pro forma adjustment for the Chena Marina extension. This is significant in light of the totality of the issues and circumstances faced by GHU/CUC and does not result in just and reasonable rates that provide GHU/CUC with a reasonable opportunity to recover and earn a return of and on its investment.

c. Clarifiers and Influent Pump

For many of the same reasons iterated above, Order 21 also reaches a flawed conclusion as relates to the proposed post-test year additions of the clarifiers and influent pump. Every part of the wastewater treatment plant is critical to the safe and reliable operation of a wastewater utility and has a direct impact on the health and safety of the utility's customers. In determining to disallow the proposed pro forma adjustments, Order 21 analogizes the clarifiers and influent pump pro forma adjustments as follows:

> GHU and CUC's adjustment for the sewer treatment plant clarifier and influent pumps is analogous to the ML&P's administrative building in Order

> U-13-184(22) discussed above. While we agree that these items may benefit the system, they are far removed from the test year and the costs and were not the impetus for GHU and CUC's rate case.[235]

This presents two aspects on which Order 21 predicates the decision to disallow these pro forma adjustments: 1) the plant is too far removed from the test year; 2) and they were not the impetus for the rate case.

The clarifiers and pump were placed into service five months after the conclusion of the test year, but before the filing of the rate case.[236] Furthermore, they had been providing benefits to customers for approximately 21 months prior to the issuance of Order 21. These additions were known and measurable at the time of the filing. The plant is and was used and useful at all times that the rates set in this proceeding were in effect. Rejecting these known and measurable pro forma post-test year adjustments means that the utility will forever forego the recovery of and on that portion of the investment, and that the rates in effect under Orders 21 and 26 did not reflect the actual plant that was used and useful in providing service to ratepayers in that time period. GHU/CUC's preliminary calculations reflect that Order 21 as issued decreases GHU/CUC's annual revenue requirement by at least $128,219 attributable to denying the pro forma adjustment for the clarifiers and by $20,220 for the influent pump.

Although the magnitude of the impact from the clarifiers or influent pump on its own may not be the primary driver of this rate case, the cumulative impact of these two

[235] Order 21 at 48 [Exc. 0831; R. 038011].
[236] *Id*. at 47 [Exc. 0830; R. 038010].

plant additions is comparable to the annualization of mid-test year additions in ENSTAR. GHU/CUC recognize that post-test year pro forma situations are distinct from mid-test year annualizations. However, the underlying premise behind granting adjustments to the test year is the same for both situations: to ensure rates reasonably compensate the utility for its investment that is used and useful in providing service to ratepayers during the period those rates are in effect. Disallowing pro forma adjustments for unusual and nonroutine investment in plant that was known and measurable prior to the filing of the rate case, and nearly two years prior to determination of permanent rates, unreasonably elevates form over substance.

D. CONSUMPTION ADJUSTMENT

Order 21 denied GHU/CUC's proposed adjustment to account for projected declining consumption during the rate years.[237] Based on GHU/CUC's initial calculations, Order 21's rejection of the consumption adjustment reflects at least a $490,855 decrease in GHU/CUC's combined annual revenue requirement. Ultimately, the Commission determined that "the model used . . . as well as the size of the adjustments themselves, were significantly flawed."[238] The actual consumption data for 2019 and the first eight months of 2020 were admitted into the record during the hearing.[239] While the actual consumption data do not line up precisely with GHU/CUC's proposed model, they do support GHU/CUC's contention that the test year 2018 consumption data are not representative of

[237] Order 21 at 29-30 [Exc. 0812 to 0813; R. 037992 to 039773].
[238] *Id*.
[239] *See* H-058 to H-060 [Exc. 0749 to 0754; R. 031833 to 031838].

the billing determinants to be expected in the rate years. Even the RCA in Order 21 acknowledged that GHU/CUC experienced a decline in consumption both before and after the test year.[240]

Under the preponderance of the evidence standard, to support the use of an adjustment to the test year consumption, GHU/CUC needed to induce a belief in the minds of the Commission that GHU/CUC's assertions of declining consumption are probably true—that it is more likely than not to occur as represented by GHU/CUC.[241]

The characterization in Order 21 that the size of GHU/CUC's proposed adjustments were "significantly flawed" cites to a portion of the transcript during Commissioner Scott's questioning of Mr. Wilks on the particulars of GHU/CUC's consumption model. Commissioner Scott during the hearing acknowledged that GHU/CUC's model correctly predicted that there was a decline, but took issue with the amount by which the predicted decline differed from the actual data.[242] Based on the language in Order 21 and the citation to that portion of the transcript, the Commission does not appear to be requiring GHU/CUC to demonstrate that declining consumption is more likely to occur than not during the rate years. Rather, the Commission is holding GHU/CUC to a higher standard, to show that the predicted decline levels used are "**fully** support[ed] by data and testimony," and to

[240] Order 21 at 29 ("We are sympathetic to GHU and CUC's declining consumption.") [Exc. 0812; R. 037992].
[241] Order No. U-16-071(7) at 20 (ACS of Alaska, LLC tariff revision) ("The standard of proof in administrative proceedings is preponderance of the evidence unless otherwise stated." (citing to *Amerada Hess* at 1179 n.14)); *Spenard Action Comm.,* 902 P.2d at 774 n.15 (citations omitted).
[242] Tr. at 436, Lines 3-8 [Exc. 0748; R. 021002].

address modeling issues such as autocorrelation tests to probe for parameter bias.[243] This is contrary to the well-established standard of proof in administrative proceedings: "preponderance of the evidence."[244] Alaska courts have long held that under a preponderance of the evidence standard, "[c]lear and convincing proof is not required."[245] Instead, a party need only "induce a belief in the minds of the jurors that the asserted facts are probably true (e.g., "more likely than not"). [246] This contrasts with the clear and convincing proof standard where "there must be induced a belief that the truth of the asserted facts is highly probable."[247]

Order 21 appears to be imposing a clear and convincing evidence standard that GHU/CUC's model must predict the level of declining consumption to a degree that the predicted amounts are highly probable. Such a standard is not required, nor is it authorized under the Commission's regulations or the relevant Alaska Statutes.

Nonetheless, even applying the erroneous evidence standard used by the Commission in Order 21, GHU/CUC demonstrated that declining consumption in the rate years is highly probable—and the Commission acknowledged this in the order. Neither Order 21 nor Order 26 address GHU/CUC's analysis of the evidence in the record as was set forth in its closing arguments. Exhibit H-058 shows the predicted 2019 volumetric

[243] Order 21 at 30 (emphasis added) [Exc. 0813; R. 037993].
[244] Order No. U-16-071(7) at 20 ("The standard of proof in administrative proceedings is preponderance of the evidence unless otherwise stated." (citing to *Amerada Hess* at 1179 n.14)).
[245] *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).
[246] *Spenard Action Comm.*, 902 P.2d at 774 n.15 (citations omitted).
[247] *Id.*

demand compared to actual demand for GHU/CUC Water and Wastewater was 96.44 percent and 94.18 percent respectively. In other words, the predicted 2019 demand for GHU/CUC Water and Wastewater varied from actual demand by 3.56 percent and 5.82 percent respectively. Excluding UAF and FWW, Exhibit H-058 shows that predicted 2019 volumetric demand compared to actual demand for GHU/CUC Water and Wastewater was 99.17 percent and 96.85 percent respectively.[248] In other words, the predicted 2019 demand for GHU/CUC Water and Wastewater varied from actual demand by 0.83 percent and 3.15 percent respectively. Given that no model will ever perfectly predict future results, GHU/CUC respectfully posit that modeling results that reach a level of accuracy between 94.18 percent and 99.17 percent when compared to actual results, are reasonably accurate and that the predicted outcomes were in fact highly probable.

The record shows that test year 2018 consumption is not representative of the billing determinants to be reasonably expected in the rate years.[249] Exhibit H-060 shows that with UAF excluded, volumetric water consumption declined by 6.4 percent from January through August 2018 compared to January through August 2020. With UAF and FWW excluded, volumetric sewer collection declined by 8.01 percent from January through August 2018 to January through August 2020. Those declines are much greater than the 2.7 percent and 4.2 percent proposed water and sewer revenue reduction adjustments for test year non-UAF and non-FWW revenues, and provide compelling evidence that

[248] For an overview of why excluding UAF and FWW are warranted in this analysis, please refer to Tr. at 570-577 [Exc. 0758 to 0765; R. 021161 to 021168].
[249] *See* H-060 [Exc. 0754; R. 031838].

GHU/CUC's model projected consumption declines that are too conservative. Based on the evidence in the record, Order 21's determination to strictly adhere to the unadjusted test year consumption does not logically follow from a criticism that the model is not sufficiently accurate. The test year consumption data are even less representative of the actual data from the 2019 and 2020 rate years.

Even if the Commission does not agree that the predicted results were modeled with a sufficient degree of certainty, the evidence in the record is more than enough to provide for some level of consumption adjustment based on the actual, documented consumption declines observed during the pendency of this proceeding. The answer should not be "either precisely what a party's model predicts or nothing at all."[250] Not allowing any adjustment to the test year consumption data guarantees that the rates do not reflect actual consumption in the rate years. Allowing zero adjustment for the obvious decline causes the rate year to not be represented by the test year. Failure to allow for this pro forma adjustment leaves the utility with only one avenue of recourse to attempt to mitigate regulatory lag: significantly more frequent rate cases.

E. OVERALL IMPACT RESULTS IN UNJUST RATES

There are many court decisions that provide guidance for judicial review of ratemaking orders by regulatory bodies such as the RCA. The decision by the U.S.

[250] *See Glacier State*, 724 P.2d at 1193 (where the RCA's predecessor excluded from rates 100 percent of certain utility operating division expenses because the utility "failed to meet its burden of proof" of the reasonableness of the full amount, the court remanded to the commission to determine the level of expenses that were reasonable).

Supreme Court in *In re Permian Basin Area Rate Cases* states, "reviewing courts will require criteria more discriminating than justice and arbitrariness if they are sensibly to appraise the Commission's orders."[251] The Court continued to state that the regulatory body is "obliged **at each step of its regulatory process** to assess the requirements of the broad public interests entrusted to its protection" and that "the 'end result' of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they 'maintain credit and attract capital.'"[252] In describing the responsibilities of a reviewing court during an appeal of a ratemaking order, the Court stated:

> It follows that the responsibilities of a reviewing court are essentially three. First, it must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable.[253]

Under *Permian Basin*, a reviewing court needs to go further than merely examining the "justice and arbitrariness" of a commission order in a ratemaking proceeding. Among the three identified responsibilities of a reviewing court, the Supreme Court specifically states

[251] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790, 88 S. Ct. 1344, 1372, 20 L. Ed. 2d 312 (1968) (internal citations omitted) ("*Permian Basin*").
[252] *Id.* at 791 (internal citations omitted) (emphasis added).
[253] *Id.* at 790-792 (internal citations omitted).

that a court "must decide whether *each* of the order's essential elements is supported by substantial evidence" and the regulatory agency is required "at each step of its regulatory process" to assess the broad interests, including the ability of the utility to maintain its financial integrity. This is logical, because the end result of a rate order is a composition of individual components that go into establishing a revenue requirement and setting rates.

This is the review that GHU/CUC are seeking from this Court: 1) determine whether the RCA abused or exceeded its authority in the orders on appeal on individual issues and in the aggregate impact on final rates; 2) examine the manner and methods used by the RCA and determine if the RCA's decisions on the essential elements are supported by substantial evidence; and 3) determine whether the orders as issued may reasonably be expected to maintain GHU/CUC's financial integrity, attract necessary capital, and fairly compensate investors for the risks assumed while providing adequate protection to the public interest now and for the foreseeable future. Throughout the course of the proceedings before the RCA and Superior Court, GHU/CUC have shown that the overall impact of Orders 21 and 26 results in rates that are unjust and unreasonable, and that the RCA has acted arbitrarily and exceeded its authority on multiple issues. The RCA did not assess the impacts, success, and efficacy at each step of its ratemaking procedure of those decisions on GHU/CUC's financial integrity.

GHU/CUC have identified the essential elements of the RCA's decisions in the rate order that are not supported by substantial evidence, including failures to follow relevant precedent or adequately explain departures therefrom, unlawful imposition of higher

standards of proof, and using a methodology for the ROE that was rejected by both expert witnesses as unreliable in this case. GHU/CUC identified, to the extent possible, the financial impacts from each of these decisions on the final revenue requirement based on Orders 21 and 26 as issued.[254] GHU/CUC showed that the decisions on appeal result in cumulative reductions to the combined utilities' annual revenue requirement of $2,161,735 from the amount sought by GHU/CUC, and resulted in approximately a $1 million potential refund liability for interim rates. The RCA's decisions on appeal represent a 7% decrease to the revenue requirement that GHU/CUC believes the record supports that it is entitled to under just and reasonable rates. Such a decrease is substantial and does not serve to maintain GHU/CUC's financial integrity, particularly in light of the declining consumption GHU/CUC is facing which was recognized by the RCA in Order 21[255] and years of achieved ROEs far below authorized levels.

GHU/CUC have provided adequate substantial evidence in the record to support their claims that they need the revenue requirement requested to support the financial integrity of the utilities, including access to capital for necessary improvements in the

[254] *See Illinois Bell Telephone Co. v. F.C.C.*, 988 F.2d 1254 (1993). In evaluating whether a utility met its "heavy burden" to support a claim that rates are confiscatory, the DC Circuit Court upheld the Federal Communications Commission's analysis that there was no Fifth Amendment takings basis that the rates were confiscatory because the utility, Ameritech, failed to identify any disallowances that must be compensated for in rates or estimate the aggregate size of these disallowances. Unlike Ameritech, GHU/CUC have provided the best estimates possible of the sizes of each disallowance that should be compensated for in rates. GHU/CUC Opening Brief at 21-22 [R. 034151 to 034152].

[255] Order No. 21 at 29-30 [Exc. 0812 to 0813; R. 037992 to 037993].

foreseeable long-run.[256] Under *Permian Basin*, the RCA is required to consider whether the order may reasonably be expected to *maintain* GHU/CUC's financial integrity both currently and for the foreseeable future. The only analysis or discussion by the RCA in the orders on appeal that shows that the RCA made any such consideration is in Order 26 with respect to the decision to remove the energy costs of the administrative building from the cost of energy ("COE") mechanism "is unlikely to cause financial harm to the utility."[257] No such analysis was made or provided for the RCA's decisions on any of the other issues on appeal. The RCA's failure to make any such analysis in its ratemaking orders is arbitrary and capricious, and the court should remand these orders with instructions for the RCA to make an adequate, reasoned analysis based on the record for how its decisions at each step of its ratemaking process provide adequate protection of GHU/CUC's financial integrity for the foreseeable future.

Several of the issues on appeal individually result in unjust and unreasonable rates.[258] Furthermore, the overall impact of the RCA's unlawful, unreasonable, arbitrary, or capricious decisions in the orders on appeal is composed of the combination, and often interrelated, natures of those individual components at issue in this appeal. For example, an error in calculating the approved ROE is then magnified by the decisions affecting what plant is included in rate base. As such, the individual magnitude of any of these changes

[256] Tr. at 150-154, 190, 207-208 (Blessing) [Exc. 0713 to 0717, 0720, 0724 to 0725; R. 020657 to 020661, 020697, 020714 to 020715].
[257] Order 26 at 11 [Exc. 0886; R. 038040].
[258] Appellants' Opening Brief at 30, 53, 71; [Exc. 0854, 0871; R. 020149, 020166].

cannot be identified in isolation with certainty, and neither can the cumulative impacts until the Court makes its decision to uphold or remand the RCA's decisions affecting each component on appeal. But as issued, the best estimate from the record is that the cumulative impact on GHU/CUC's annual revenue requirement is greater than $2 million as discussed above. A 7% reduction to what GHU/CUC believe is necessary to maintain their financial integrity for the foreseeable future is a significant threat, as evidenced by GHU/CUC's need to file a new rate case mere months after the RCA issued its final order setting rates that increased both the annual revenue requirement and the ROE substantially over what was approved in Order 21.

F. THE RCA'S DECISION TO REQUIRE GHU/CUC TO CHOOSE BETWEEN PLACING REVENUE RECEIVED FROM INTERIM RATE INCREASES IN ESCROW, OR PAYING INTEREST AT THE RATE OF 10.5 PERCENT ON ANY REFUNDS AFTER A FINAL RCA DECISION SHOULD BE REVERSED AND REMANDED AS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

1. Background—Interim Rate Relief and RCA's Order 1.

Interim rate relief is relief afforded to a public utility pending investigation and administrative proceedings regarding final requested rate relief. It provides a temporary increase of rates pending a hearing and decision on final rates. A key purpose of interim rate relief is to avoid continued application of existing rates that have become confiscatory, as confiscatory rates are not "just and reasonable" and thus are prohibited under AS 42.05.431(a).[259] Interim rate relief is also an essential component of rate proceedings because a utility may not address confiscatory rates pending an adjudication through

[259] *See Glacier State,* 724 P.2d at 1192-93.

retroactive billing of its customers, or otherwise recoup past losses if interim rates charged are too low.[260]

Interim rate relief pending investigation and adjudicative proceedings regarding permanent rate increases is not granted automatically. If requested, the RCA must conduct an analysis to determine the need for relief under *GAAB*.[261] GHU/CUC requested interim rate relief in May 2019 when they filed their four tariff advice letters requesting permanent rate changes. Although GHU/CUC requested final rate increases of 16.6063 percent (water) and 18.1034 percent (wastewater), the interim rate increases requested were lower—only 10.5 percent (water) and 12 percent (wastewater).[262] The rates were also explicitly requested to be refundable—in the event that final rate increases were lower than the interim increases, the difference would be refunded at the conclusion of the proceeding. GHU/CUC made no request for any other conditions on interim rates, such as use of an escrow account or interest on refunds.[263]

In Order 1, the RCA granted GHU/CUC's request for interim and refundable rate relief with little discussion of its reasoning.[264] Instead, the RCA quoted, seemingly

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[260] *AJ Industries, Inc. v. Alaska Pub. Utils. Comm'n*, 470 P.2d 537, 541 (Alaska 1970).
[261] 534 P.2d 549 (Alaska 1975); *see* background discussion re *GAAB supra* at Section III.C.
[262] H-001 to H-004 [Exc. 0049 to 0255 (duplicative tariff advice letter exhibits removed); R. 021472 to 022241 (complete tariff advice filings)].
[263] *Id*.
[264] Order 1 at 3-5 [Exc. 0258 to 0260; R. 017528 to 017530].

approvingly, GHU/CUC's own analysis of why interim and refundable rate relief was warranted under the five-step *GAAB* standard:[265]

> First, the utility must make a serious and substantial showing that the existing rates are so low as to be confiscatory. Second, the utility is obligated to show that no date has been set by the Commission for a prompt final hearing, and that the existing confiscatory rates are likely to remain in force for an unreasonable period of time before the APUC makes its permanent rate determination. Third, the utility must convince the court that without the benefit of being permitted to operate under an interim rate increase, it will face irreparable harm. Fourth, the utility is required to demonstrate that if the interim rate relief is granted, the public can be adequately protected. Fifth, the utility must show that "serious" and 'substantial' questions are involved in the rate case it has presented."[266]

In the analysis quoted by the RCA, GHU/CUC concluded that the Revenue Requirement Study showed that there was a substantial revenue deficiency, such that existing rates were low enough to be confiscatory, requiring an immediate rate increase.[267] Further, GHU/CUC determined that the currently effective permanent rates could be expected to remain in place for an extended period time, much longer than the six months deemed in *GAAB* to be too long if rates are confiscatory.[268] Because it is well established that utilities may not bill their customers retroactively upon approval of a rate increase or

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[265] *Id.* (quoting TA101-118 at 5-6; TA140-97 at 5-6; TA95-290 at 5-6; TA145-37 at 5-6 (footnotes omitted)); *GAAB,* 534 P.2d 549.
[266] *RCA Alaska Commc'ns, Inc.,* 597 P.2d at 494 (Alaska 1978) (citing *APUC v. GAAB*, 534 P.2d 549, 554, 557 (Alaska 1975), *departed from on other grounds by Owsichek v. State, Guide Licensing & Control Bd.*, 627 P.2d 616, 620 (Alaska 1981)).
[267] Order 1 at 4 [Exc. 0259; R. 017529].
[268] *Id*. GHU/CUC noted in the Tariff Advice Letters, H-001 to H-004 [Exc. 0049 to 0255 (duplicative tariff advice letter exhibits removed); R. 021472 to 022241 (complete tariff advice filings)], that given the Commission's current docket activity, the utility could expect a suspension lasting 12 to 15 months before permanent rates would be established.

otherwise recoup past losses if rates charged are too low, GHU/CUC argued that a rate increase was justified under the "balance of hardships" test (balancing utility and customer hardships).[269] As part of the test, the *GAAB* standard requires that customers ("the public") be "adequately protected."[270] GHU/CUC noted in the tariff advice letters that customers would be protected under *GAAB* because the interim rates were requested to be refundable in the event that a permanent increase is less than the interim increase.[271] Finally, GHU/CUC noted that it had made a showing that the requested rate increase was not frivolous or obviously without merit.[272]

After quoting GHU/CUC's analysis, the RCA granted the requested interim and refundable rate increase of 10.5 percent increase for water customers and 12 percent for wastewater customers.[273] But in its decision, it also placed an additional requirement, not requested by GHU/CUC, on the interim rates granted. The RCA stated:

> GHU and CUC may place the amounts received by reason of the interim and refundable rate increases in escrow or agree to pay the statutory interest rate of 10.5% per annum, specified by AS 45.45.010(a), on any refunds that may be required at the conclusion of these dockets. We require GHU and CUC to advise us as to their choice between these options. Interest on an escrow account or interest at 10.5% will begin to accrue when customers pay bills based on the interim and refundable rates and continue until all refund amounts, if any, are paid to customers. We require GHU and CUC to keep an accurate accounting by customer of all amounts received under the interim and refundable rates granted in this order and

[269] *Id*. The *GAAB* standard was established based on the judicial standard for granting preliminary injunctions.
[270] *RCA Alaska Commc'ns, Inc*, 597 P.2d at 494.
[271] Order 1 at 4. [Exc. 0259; R. 017529].
[272] *Id*.
[273] *Id*. at 5 [Exc. 0260; R. 017530].

> the related interest. If refunds are required at the conclusion of this proceeding, we will require GHU and CUC to file a plan for disbursement of refunds.[274]

The decision contained no additional explanation or rational for this requirement to choose between escrow or payment of 10.5 percent interest.

Under *GAAB,* an RCA decision to grant an interim rate increase has a reasonable basis where the utility is protected from confiscatory rates by the interim increase and where the "public can be adequately protected" as well by the interim rate increase order.[275] While use of escrow is not required in cases of interim rates, AS 42.05.421(c) provides the RCA discretionary authority to require use of an escrow account for the difference between existing rates and interim rates, subject to a utility's right to substitute a bond "in lieu of the escrow requirement" at its own expense.[276] But this authority to require escrow is not exempt from judicial review, and an agency's exercise of discretionary authority to require escrow may still be "arbitrary, unreasonable or an abuse of discretion."[277]

Here, the RCA's requirement that a utility place revenues received by reason of interim rate increases in escrow for repayment of any refunds (with, presumably, any interest earned from that escrow account), or that the utility pay refunds at an interest rate of 10.5 percent, lacks a reasonable basis and is arbitrary and capricious. First, the RCA provides no findings, reasoning, or application of law to the facts of this case to support its

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[274] *Id*.
[275] *RCA Alaska Commc'ns, Inc.,* 597 P.2d at 494.
[276] AS 42.05.421(c)); *see also Alaska Pub. Utils. Comm'n v. Municipality of Anchorage*, 579 P.2d at 1074 (affirming Commission ability to require escrow "[a]bsent a showing that the Commission abused its discretion").
[277] *See May*, 168 P.3d at 879–80.

"escrow or 10.5 percent interest" requirement. Second, the RCA provides no statutory authority for its "escrow or 10.5 percent interest" requirement, and the requirement is an improper rulemaking. Third, to the extent the RCA may argue that it relied on precedent for its decision, this explanation fails because it did not identify any precedent or explain how it applies to the facts in this matter, and because the RCA's past "escrow or 10.5 percent interest decisions similarly lacked a reasoned explanation, and ignores different precedent on the issue. Fourth, the RCA's *post hoc* rationalizations for its decision in the appeal process cannot remedy the failure to issue a reasoned decisional document. Finally, GHU/CUC did not waive its arguments regarding the "escrow or interest" choice.

2. The RCA's decision in Order 1 to require either escrow or interest on any interim rate refunds should be remanded because the RCA provides no findings or reasoning for its decision to mandate the choice.

The RCA's decision requiring either escrow or interest on any interim rate refunds must be remanded for further proceedings and findings by the RCA because the RCA provided no explanation or reasoning for its decision in Order 1. Alaska Statute 42.04.191 requires that "[e]very formal order of the commission shall be based upon the facts of record," and that, "[e]very order entered pursuant to a hearing must state the commission's findings, the basis of its findings and conclusions, together with its decision." [278] Additionally, this Court has found that agency decisions, in the exercise of their adjudicative powers, must be accompanied by "written findings and a decisional

[278] AS 42.04.191.

document."[279] The decisions of an agency "must be adequately documented" in order to "ensure careful and reasoned administrative deliberation and to facilitate judicial review."[280] An agency decision regarding analysis of the *GAAB* factors should be upheld by a court if it has a reasonable basis,[281] and any discretionary agency decisions (including whether to exercise its discretionary authority under AS 42.05.421(c) to require use of an escrow account for interim rate increases) must not be "arbitrary, unreasonable or an abuse of discretion."[282] Thus, even where an agency exercises its discretionary authority, a reviewing court must be able to ensure that the agency "has given reasoned discretion to all the material facts and issues," and a "decisional document, done carefully and in good faith, serves several salutary purposes," including "facilitating judicial review."[283] Where a decisional document is "found to contain an inadequate reasoned explanation," a court is authorized to "remand it to the agency for supplementation."[284]

The RCA's Order 1 lacks *any* explanation for its requirement that GHU/CUC choose between use of an interest-bearing escrow account or repayment of any refunds

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[279] *Peninsula Mktg. Ass'n v. State*, 817 P.2d 917, 922–23 (Alaska 1991) (quoting *Johns v. Com. Fisheries Entry Comm'n,* 758 P.2d 1256, 1260 (Alaska 1988)). Even "non-adjudicative decisions of an agency must also be supported by an adequate decisional document." *Id.*

[280] *Id*. (quoting *Messerli v. Dep't of Nat. Res.,* 768 P.2d 1112, 1118 (Alaska 1989)).

[281] *RCA Alaska Commc'ns, Inc.*, 597 P.2d at 495.

[282] *May* 168 P.3d at 880; *Se. Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 548–49 (Alaska 1983), *overturned due to legislative action* (where "agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary").

[283] *Se. Alaska Conservation Council, Inc.,* 665 P.2d at 549. [284] *Id*.

with 10.5 percent interest.[285] Instead, the RCA simply quoted the portion of GHU/CUC's interim rate request that stated why GHU/CUC's request met the *GAAB* standard.[286] In its request quoted by the RCA, GHU/CUC stated, in part, that "interim but refundable rates protect customers in the event that the permanent rate increase approved is less than the interim rate."[287] After quoting this analysis, the RCA granted GHU/CUC's request (including the customer protection component of the analysis), but added, without discussion, the "escrow or 10.5 percent interest" requirement on the interim rates. The RCA did not cite to any relevant statutes, case law, or RCA precedent to provide support for its authority to place this requirement on GHU/CUC, nor did it apply any relevant law or precedent to the specific facts in this situation to explain why it applied this additional requirement. The RCA provided no reasoning or findings regarding how, in this instance, the addition of a requirement on potential refunds beyond refundability was required to meet the *GAAB* standard that interim rates should only be granted if, in part, "the public can be adequately protected."[288] If the RCA believed it was relying on precedent in its decision, it cites to none in the decision, nor does it explain how any precedent applies to the specific facts of this matter.[289]

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[285] Order 1 at 5 [Exc. 0260; R. 017530].
[286] *Id.* at 4 [Exc. 0259; R. 017529].
[287] Id.
[288] *RCA Alaska Commc'ns, Inc.,* 597 P.2d at 494.
[289] *Se. Alaska Conservation Council, Inc.,* 665 P.2d at 549, n. 17 (quoting 3 K. Davis, Administrative Law Treatise § 14.26, at 123 (2d ed. 1980) (stating that courts "should take into account that findings and reasons are usually two of the four elements in a bundle of protections against arbitrariness—open standards, open findings, open reasons, and open precedents")).

Order 1 contains no explanation of its decision to apply an "escrow or interest" requirement to potentially refundable revenue such that this Court (or GHU/CUC) can divine the basis for the RCA's decision. As such, the decision to require either escrow or interest on refunds at a rate of 10.5 percent should be remanded to the RCA for further proceedings consistent with this court's opinion.[290] Even if the RCA had defensible justification for its decision in Order 1, it is impossible for this Court to be able to determine that without an explanation in the decision. In cases such as this, failure to explain an agency decision could potentially deprive a court of the ability to even determine the proper standard of review to apply.[291]

3. The RCA provided no statutory authority for its "escrow or 10.5 percent interest" requirement, and without a decision applying law to facts, the requirement is an improper rulemaking.

[290] While GHU/CUC submitted the requested election of interest or escrow by the deadline required, electing repayment at interest of 10.5 percent, the funds (potential refunds and interest) have been in an interest-bearing escrow account pending the appellate process.

[291] For instance, the Alaska Supreme Court has previously noted that while application of the *GAAB* standard normally implicates the "reasonable basis" standard of review, there might be elements of such review subject to the substitution of judgment standard. *See, e.g., RCA Alaska Commc'ns, Inc.*, 597 P.2d at 495, 508 (1978) (noting that "evaluations of constitutionality and other 'pure' issues of law are within the special expertise of the courts rather than the agency" and that the standard of review on such agency determinations implicate the "substitution of judgment" standard of review). Without understanding the reasoning of the agency, a court cannot know what standard of review to apply to the decision. For instance, if the RCA required 10.5 percent interest because it thought that it was required to apply that amount, and no less, based on the RCA's interpretation of the statute AS 45.45.010, then this Court would review the RCA's interpretation of that statute under the substitution of judgment standard. But here, *post hoc* attempts at rationalization by the RCA's attorney in superior court notwithstanding, the parties and the Court have no way of knowing what the reasoning of the RCA was in issuing Order 1, and therefore what standard of review to apply.

The RCA does not indicate in its decision what, if any, statutory authority the RCA relies upon as a source of its authority for the "escrow or 10.5 percent interest" requirement for interim rate refunds. This Court applies the independent judgment standard of review to issues of statutory interpretation in agency appeals.[292] While AS 42.05.421(c) provides authority to the RCA, in its discretion, to require escrow of interim rate increases, it provides no explicit authority to require interest on refunds.[293] In fact, a review of the legislative history of AS 42.05.421 shows that while draft versions of AS 42.05.421 did initially include a provision that refunds would be paid with interest (at a rate "not exceeding six percent per annum"), this provision was removed during the legislative process.[294] Thus, the Legislature was very explicit and specific in its grant of authority to require escrow of potential refunds in AS 42.05.421(c), but chose to provide no such explicit authority regarding interest on refunds.[295] Under the plain meaning of AS

[292] *Williams Alaska Petroleum, Inc. v. State,* 529 P.3d 1160, 1176 (Alaska 2023).
[293] *See id.* (stating that in reviewing statutes, this Court "interpret[s] statutes according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters") (internal quotations and citations omitted).
[294] *See* H.B. 202A, 6th Leg., 1st Sess. (Alaska 1969); House Bill 202 Sectional Analysis, House Judiciary Committee (April 9, 1969); § 6 Ch 113 SLA 1970.
[295] The parallel RCA statute for pipeline carriers (AS 42.06.400) was enacted after AS 42.05.421 and, identical to AS 42.05.421, only required a pipeline carrier to place the difference in revenue between the filed tariff and the temporary tariff in an escrow account. *See* § 1 ch 139 SLA 1972. AS 42.06.400(b) was later amended to require the shipper or the receiver to pay the difference between the permanent rate and the temporary rate with interest at the legal rate as defined under AS 45.45.010(a). *See* amended § 1 ch 22 SLA 1978. The interest provision for pipelines only pertains to the suspension of an initial tariff and the payment can be made by the shipper or the receiver (typically both sophisticated commercial entities), depending on whether the permanent tariff exceeded the temporary tariff or not. AS 42.05.421 does not allow utilities to recover money from customers if the interim rates are less than the permanent rates.

42.05.421, as well as the principle of *expressio unius est exclusio alterius*,[296] AS 42.05.421(c) provides no authority for the RCA to apply interest to utility refunds of interim rates.

Further, even if the RCA had proper statutory authority to require interest on refunds, the RCA's uniform application of the "escrow or 10.5 percent interest" requirement to potential refunds on utility requests for interim rates, without conducting a "reasoned analysis" based on the facts in each specific matter before it,[297] constitutes an improper rulemaking.[298] The RCA appears to be applying the "escrow or interest at 10.5 percent" requirement uniformly to all regulated utilities, and the requirement is a "mandatory, precise criteria," which add "requirements of substance" not articulated in existing statutes.[299] More specifically, requiring interest at the specific amount of 10.5 percent, without any application of law to facts or discussion of reasoning in each specific matter, indicates that the 10.5 percent interest requirement is a "standard in the form of a

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[296] *Alaska State Comm'n for Human Rights. v. Anderson*, 426 P.3d 956, 964 n. 34 (Alaska 2018) (noting this "maxim establishes the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions") (internal quotations and citations omitted).

[297] *AVCG,* 527 P.3d at 285.

[298] *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 396 (Alaska 1990). In *Gilbert*, the Court found that "[t]he legislature specifically defined "regulation" to "include [ ] ... 'policies' ... and the like, that have the effect of rules, orders, regulations *or standards of general application.*" *Id.* (citing AS 44.62.640(a)(3)). The "[i]ndicia for identifying a 'regulation' include (1) whether the practice implements, interprets or *makes specific the law enforced or administered by the state agency,* and (2) whether the practice affects the public or is used by the agency in dealing with the public." *Id.* (internal quotations and citations omitted).

[299] *AVCG,* 527 P.3d at 280.

precise numerical value" not foreseeable based on the text of the Alaska Public Utilities Regulatory Act.[300]

4. To the extent that the RCA may argue it was following precedent in requiring an "escrow or interest at 10.5 percent" requirement, it does not cite to any such precedent in its decision, and the RCA failed to address the holding in a 2009 Superior Court decision regarding application of 10.5 percent interest to GHU/CUC rate refunds.

To the extent that the RCA has statutory authority to require interest at 10.5 percent on refunds during the period of adjudication of a final rate before the RCA, it might argue that it was following precedent in requiring the "escrow or interest" choice regarding interim rates. However, the RCA failed to conduct an analysis that properly applied any precedent to the facts of GHU/CUC's situation. Further, given the problematic nature of the RCA's most recent precedent on the issue, a remand is required so the RCA can provide more fulsome decision regarding the application of any "escrow or 10.5 percent interest" requirement, one where the RCA "conduct[s] a reasoned analysis based on the facts and figures presented to [it]."[301] Such precedent in the context of refunds would provide guidance for GHU/CUC and other utilities moving forward in light of the voluminous (and contradictory) precedent on the issue.

Prior to 2007, the RCA and the APUC rarely applied the use of *either* escrow or interest to potentially refundable interim utility rates.[302] In the infrequent instances where

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[300] *Id.* at 285.
[301] *AVCG*, 527 P.3d at 285.
[302] *See, e.g.,* Order No. U-01-108(4) at 3 (Chugach Electric Association, Inc. rate case) (declining use of escrow account for interim rate increase "because we have no evidence suggesting that Chugach will be unable to pay any refund that we might order"); Order

escrow or interest *were* required by the RCA, an explanation of why it was required under the facts of the case was typically given in a written decision. For instance, escrow was required in situations where there might be a question about a utility's financial ability to pay refunds at a later date.[303] Interest was found to be required on occasion in situations where there might be a delay in payment of refunds *after* the RCA issued a decision setting the final rate, not *during* the adjudication process before the RCA to determine the final rate.[304] For example, the RCA noted in 2001 that "[t]he courts have recognized that the

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Nos. U-79-032(1) at 5 (KUSCO) (noting that in using its discretionary power to not require escrow, the "Commission is protecting the public by requiring the utility to refund any revenue gained from the interim increase which exceeds the revenue to be derived from the ultimate granting of a permanent rate increase"); U-81-044(11) at 4 (AEL&P rate case) (requiring refund and noting that the refund is the "cornerstone to adequately protect the public against payment of excessive rates" and that therefore "*de facto* the fourth element of the *GAAB* test has been satisfied"); U-94-116(1) at 7-8 (Tongass Sanitation rate case) (providing for refundable interim rates with no discussion of escrow or interest); U-99-116(3) (Alaska Power Company rate case) (providing for refundable interim rates with no discussion of escrow or interest); U-04-022(12) (AWWU rate case) (concluding that ratepayers can be "adequately protected if we require the interim rate relief to be refundable if permanent rate relief is less than the interim relief granted").

[303] *See, e.g.,* Order No. U-02-078(1) at 2 (Crystal Cathedrals Water and Sewer System, Inc. rate case) (requiring use of escrow under AS 42.05.421(c) "until the utility provides proof to the Commission of its ability to refund the amount collected from customers if permanent rates are less than interim rates").

[304] *See e.g.,* Order No. U-87-035(21) (Chugach rate case) (noting that while typically, "in view of the relatively short time that [refunds] are generally held by utilities" the Commission has not required the payment of "such interest" but where Chugach requested another extension of time to calculate and make refund repayments, the Commission found that "it is now clear that the process of refunding the excess revenues collected by Chugach is extending over a long period of time" and that "any further extension of time to Chugach should be conditioned on the payment of interest by Chugach on refunds due," granting the extension but applying moving forward at the "statutory rate of interest, 10.5 percent per annum"); Order No. U-01-108(39) (Chugach rate case) (based on a motion from wholesale customers, deciding to apply an interest rate of any refunds that might result

purpose of interest on judgments is not to penalize, but to fully compensate a party for the loss of money," and it then applied interest beginning at the date of the final order setting permanent rates, and continuing until refunds were paid.[305]

In 2007, the RCA applied interest to interim rate refunds that were owed *after* a final rate determination resulted in refunds, and pending a superior court appeal by GHU/CUC of the final rate decision.[306] GHU/CUC appealed, and in *Golden Heart Utilities and College Utilities Corporation v. Regulatory Commission of Alaska* ("*Golden Heart*"),[307] the superior court remanded the RCA's decision to apply the "statutory rate" of 10.5 interest rate to interim rate refund obligations, finding that the RCA had provided an inadequate explanation for why that amount properly compensated consumers for the "lost use of money."[308] The Court in *Golden Heart* acknowledged that the RCA had distinguished the posture of the *Golden Heart* matter from prior precedent in an RCA decision (U-01-108(39)), where after a reasoned discussion, an interest rate of only 3.1 percent had been assessed,[309] by noting that in the prior docket, the RCA was able to "determine the cost of debt to the party receiving the refund," whereas in the current matter "the record did not reveal the cost of short term debt to GHU and CUC customers."[310] The

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from an appeal of RCA decision to court, and assessing interest at the cost of short-term debt averaged over the period refunds were owed).

[305] Order No. U-01-108(39) at 4 (Chugach rate case).

[306] Order No. U-05-043(19)/U-05-044(19) (GHU/CUC rate case).

[307] *Available at* 2009 WL 2353418 (RCA), 4FA-07-1360CI, June 8, 2009, Decision on Appeal.

[308] *Id.* at 21.

[309] *See also* Order No. U-01-108(32); Order No. U-01-108(37).

[310] *Golden Heart*, 2009 WL 2353418 at 20.

RCA in *Golden Heart* chose an interest rate of 10.5 percent and noted that this was the interest rate charged customers on past due bills, and that the cost of short term debt to customers is typically the interest rate used by credit cards.[311] Before the superior court, the RCA further argued that 10.5 percent was reasonable because it was identical to the rate established by a statute (AS 42.06.400(b)) applicable to pipeline (not public utility) rate refunds ordered by the RCA and was the legal rate of interest found at AS 45.45.010(a).[312] Despite these proffered explanations, the superior court found that under the reasonable basis standard, the RCA had failed to explain why a 10.5 percent rate on refunds was supportable.[313]

The RCA's decision to grant interest in *Golden Heart* was in response to an argument from the Attorney General that ratepayers should be "made whole for the time value of their money while GHU's appeal proceed[ed]."[314] Therefore, the superior court looked to precedent regarding prejudgment and post-judgment interest in administrative proceedings and reviewed *Pyramid Printing Co. v. Alaska State Commission for Human Rights*,[315] where prejudgment and post-judgment interest was awarded by the State

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[311] *Id*.
[312] *Id*.
[313] *Id.* at 20-21.
[314] Decision on Rehearing-Interest on Refunds, Case No. 4FA-07-1360 CI, November 13, 2009 at 2, RCA Document No. 08-0801, *available at* RCA docket U-05-044A, *http://rca.alaska.gov/RCAWeb/Dockets/DocketDetails.aspx?id=1037de30-c1ff-4b31-833d-c032d361df67*.
[315] *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights.*, 153 P.3d 994 (Alaska 2007).

Commission for Human Rights at the rate of 10.5 percent pursuant to regulation.[316] In *Pyramid* Printing, the court found that because an award of prejudgment interest is intended to "compensate a claimant for the lost use of money," the award of an interest rate of 10.5 percent would have disproportionately compensated the administrative claimant for her lost wages at the time of the award of interest.[317] It held that "any award that provides disproportionate monetary compensation may rightfully be considered punitive,"[318] and that therefore the Human Rights Commission had abused its discretion in the award because the interest rates "exceeded a rate of reasonable compensation."[319]

The superior court in *Golden Heart* relied on *Pyramid Printing* and other Alaska Supreme Court cases regarding prejudgment interest in the judicial setting, and concluded that "there are conditions attached to interest awarded pursuant to AS 45.45.010(a)," and also that the "purpose of prejudgment interest is not to penalize the losing party, but to fairly compensate the successful claimant for the lost use of the money between the date he or she was entitled to receive it and the date of judgment."[320] Most importantly, the Superior Court in *Golden Heart* noted that AS 45.45.010(a) "does not prescribe interest," but "[r]ather, it fixes a maximum limit."[321]

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[316] 2009 WL 2353418 (RCA), 4FA-07-1360CI, June 8, 2009, Decision on Appeal at 21.
[317] *Pyramid Printing*, 153 P.3d at 1002.
[318] *Id*.
[319] *Id*.
[320] 2009 WL 2353418 (RCA), 4FA-07-1360CI, June 8, 2009, Decision on Appeal at 21 (also citing *Bevins v. Peoples Bank & Trust Co.*, 671 P.2d 875 (Alaska 1983)).
[321] *Id*.

The *Golden Heart* court remanded the interest determination to the RCA for consideration of "what return on investment consumers could expect to obtain if they had use of the money during the period they were paying refundable interim rates."[322] It noted that an award of 10.5 percent may "over-compensate consumers for the lost use of their money,"[323] and therefore the RCA needed to determine on remand "what interest rate would properly compensate consumers for the lost use of this money."[324] In response to this decision, the RCA petitioned for rehearing regarding the holding on interest rates.[325] The superior court denied rehearing and reaffirmed its holding regarding interest, with further explanation of what the RCA needed to consider in deciding appropriate interest rates.[326] In denying rehearing, the Superior Court pointed out that the RCA's decision had failed to explain how the time value of money was rationally measured by consumer debt interest rates, rather than traditional means of calculating time value such as "a rate of return an individual investor might reasonably expect to receive on a secure *investment* over the course of a certain time horizon given market conditions."[327] Interlocutory review

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[322] *Id*.
[323] *Id.*
[324] *Id*.
[325] Regulatory Commission of Alaska's Petition for Rehearing, June 29, 2009, 4FA-07-1360 CI, RCA Tracking No. TR1007081, available at RCA docket U-05-044A, http://rca.alaska.gov/RCAWeb/Dockets/DocketDetails.aspx?id=1037de30-c1ff-4b31-833d-c032d361df67. Documents from the Superior Court appeal may generally be found on the RCA website at docket U-05-044(A).
[326] Decision on Rehearing-Interest on Refunds, Case No. 4FA-07-1360 CI, November 13, 2009, RCA Document No. 08-0801, *available at* RCA docket U-05-044A, *http://rca.alaska.gov/RCAWeb/Dockets/DocketDetails.aspx?id=1037de30-c1ff-4b31-833d-c032d361df67*.
[327] *Id.* at 3.

of this decision was denied,[328] and ultimately, there was no decision on remand as the parties stipulated to resolve the matter with payment of refunds that included principal and interest in an undifferentiated lump sum amount.[329]

Since 2009, the RCA has generally side-stepped addressing the *Golden Heart* precedent by providing the "escrow or interest at 10.5 percent" requirement with little explanation, as it does in Order 1. Shortly after the *Golden Heart* superior court decision, the RCA issued a handful of decisions that provided some (new) explanation for the requirement of escrow or interest at the statutory maximum of 10.5 percent. But, these decisions failed to address the *Golden Heart* court's determinations, including that even if the RCA looked to the legal rate of interest for guidance under AS 45.45.010, this rate was an upper limit, not a mandated rate. Instead, the RCA stated with little discussion that a choice between escrow and interest at the "legal rate" was appropriate because such a choice exists in AS 42.05.365 (interest on customer deposits over $100), and that the interim rate refunds were similar to customer deposits.[330] Of course, this ignores all the differences between interim rates and customer deposits, including that customer deposits are often held by utilities for *many years*. The RCA did not otherwise explain in these

[328] Regulatory Commission of Alaska's *Petition for Review*, dated Dec. 14, 2009, Supreme Court No. S-13700, RCA Tracking No. TR0907200, *available at* RCA docket U-05-044A, *http://rca.alaska.gov/RCAWeb/Dockets/DocketDetails.aspx?id=1037de30-c1ff-4b31-833d-c032d361df67*.
[329] Order No. U-05-043(21)/U-05-044(21)/U-06-076(8)/U-06-077(9)/U-07-076(18)/U-07-077(18) (Mar. 1, 2012).
[330] *See, e.g.,* Order No. U-09-090(1) at 3-4 (Alaska Power Company rate case); Order No. U-09-095(1) at 5 (Sand Point Generating, LLC rate case).

decisions how a statutory requirement lifted from that very different context meets the goal of protecting consumers in the context of refunds of interim rates. In at least one decision issued in 2010, the RCA explained that it believed interest was warranted because utilities had use of more customer money than required where refunds occurred.[331] There is no indication if this was the reasoning the RCA applied in Order 1.[332]

For approximately the 10 years before Order 1 was issued in this matter, the RCA has presented utilities with the "escrow or interest" boilerplate requirement, with an absence of reasoning or individual application of precedent to the facts.[333] Further, the

[331] Order No. U-10-104(1) (TDX Adak Generating, LLC rate case) (providing a choice between escrow in an interest bearing account or repayment of refunds at 10.5 percent interest, noting that "[w]e believe it is an appropriate balance between the utility and its customers to require the payment of interest on any amounts refunded").

[332] Indeed, several years later, in 2013, the RCA provided new reasoning why it found application at the statutory interest rate to be appropriate. Order No. U-13-168(7) (Doyon Utilities rate case). The RCA refused utility Doyon's request that no interest accrue on refunds, and cited to *AJ Industries, Inc. v. Alaska Pub. Service Comm'n,* 470 P.2d 537, 542 (1970) for the proposition that "part of the protection for utility customers envisioned by the Alaska Supreme Court is the imposition of the legal rate of interest on any refundable amounts due after our final adjudication." However, that case pre-dated the statute regarding interim rates, and was addressing interest to be applied to a trust fund to be put in place pending resolution of court proceedings, where a court injunction required an interim rate. *Id.* at 542. And the RCA's decision in U-13-168(7) again ignored the prior holding in *Golden Heart* that the statutory interest rate was an upper limit on rates.

[333] *See, e.g.,* Order No. U-12-140(1) at 4 (McGrath Light and Power Company rate case) ("[the utility] may place the amounts received by reason of the interim and refundable rate increase in escrow or agree to pay the interest rate of 10.5 percent per annum, specified by AS 45.45.010(a), on any refunds that may be required at the conclusion of this docket"); Order No. U-13-006(1) at 4 (ML&P rate case) (same rationale provided by the RCA); Order No. U-14-002(1) at 4 (Alaska Power Company) (same rationale provided by the RCA); Order No. U-15-101(1) at 4 (Sandlake Services rate case) (same rationale provided by the RCA); Order Nos. U-19-005(1)/U-19-006(1) at 4 (AWWU rate case) (same rationale provided by the RCA).

RCA continues to apply the choice as a matter of course when it opens a docket to investigate rate increases without explanation or citation to any authority for the requirement.[334] Use of the "escrow or interest at 10.5 percent" requirement ignores the 2009 superior court ruling in *Golden Heart* and other past precedent regarding interest on interim rate refunds. The RCA's decision in Order 1 to apply 10.5 percent interest as "specified by AS 45.45.010(a)" if interim rate increase amounts are not placed in escrow, with no additional explanation, contravenes the sound direction provided by the superior court in *Golden Heart.*[335] Application of an interest rate of 10.5 percent to refunds, without providing explanation why that interest rate is appropriate in light of the discussion in *Golden Heart*, provides another reason that the RCA's decision regarding interest on refunds was arbitrary and capricious.

Further, the *Golden Heart* superior court addressed interest applied once a permanent rate decision had already occurred, and thus after refunds would arguably even be "due" under AS 45.45.010(a). Here, the RCA decision required interest for the entirety of the time that interim rates are in place—while the matter of final rates was adjudicated, and thus before it was even known by GHU/CUC, or the RCA, that refunds were even due. GHU/CUC can only know what refunds might even be due once final rates are determined in a final agency decision, and even then, pursuant to RCA approval of a refund plan. AS

[334] *See, e.g.,* Order No. U-12-004(1) (February 23, 2023) (Unified Alaskan Utilities) (requiring, without explanation, the utility to make an election between escrow and interest at 10.5 percent); Order No. U-22-081(1) (ENSTAR) (same).
[335] *Available at* 2009 WL 2353418 (RCA), 4FA-07-1360CI, June 8, 2009, Decision on Appeal.

45.45.010(a) states that the rate of interest is "10.5 percent a year and no more on money *after it is due*" (emphasis added). There is no indication that the "legal rate" on money after it is due under AS 45.45.010(a) would apply in the context of pre-decisional interest.

Order 1 also provides no explanation why the applicable interest rate where escrow is not used is so vastly different from the interest typically applied with use of an escrow account. If GHU/CUC had chosen to use an escrow account, they would only need to pay interest on refunds equal to the interest on the escrow account.[336] Interest on such a short-term savings account is typically nowhere near 10.5 percent.[337] No explanation is provided for what the interest on an escrow account should be in Order 1, but the Alaska Supreme Court has previously upheld such use of an escrow account under AS 42.05.421(c) for increased revenues from interim rates, and noted that such funds would be placed in escrow, "at a reasonable rate of interest."[338] Here, the RCA provides no explanation in Order 1 as to why a seemingly higher interest on refunds would apply where a utility chooses to not use an escrow account.

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[336] Order 1 at 5 [Exc. 0260; R. 017530].

[337] For example, the potential refund liability was placed into escrow during superior court appeal, and remains in that account pursuant to the Superior Court's Order Re Stay, and generates interest at a rate "based on the prevailing FNBA regular Business/Consumer Savings rate." *See*, *Exhibit 2* to May 26, 2021 *Motion for Stay* (Signed TY18 Escrow Agreement). [Exc. 0916; R. 037444]. Further, under AS 42.05.421(c), a utility always has the option, where escrow is imposed, to choose to instead post a bond in lieu of escrow (and any associated interest).

[338] *Alaska Pub. Utils. Comm'n v. Municipality of Anchorage*, 579 P.2d at 1073 (noting that a decision on discretionary use of escrow will be upheld unless it was an abuse of discretion).

5. The RCA's post-hoc rationalizations for its "escrow or interest at 10.5 percent" requirement cannot remedy deficiencies in an administrative decision.

Before the superior court, counsel for the RCA provided several *post hoc* rationalizations for the "escrow or interest at 10.5 percent" requirement, but these explanations only highlighted the problems with the RCA's requirement.[339] For instance, counsel asserted at oral argument that the RCA was concerned about "unjust enrichment" where utilities did not place potentially refundable rates in escrow.[340] Similarly, in its brief below, the RCA argued that the option of interest at 10.5 percent prevents the interest option from "being so attractive that the utility has in incentive to seek an excessive rate on an interim basis."[341] RCA's counsel cited to no evidence that excessive interim rates were a problem in this matter, or even generally.[342] An agency's action must be upheld on the basis articulated by the agency itself, and this Court should not accept *post hoc* rationalizations from RCA counsel in the place of a well-reasoned decision.[343] These

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[339] *See, e.g.,* Tr. at pages 61-64 (noting at lines 3-4 of page 62 the Commission's interest in maintaining the financial integrity of Alaska utilities").
[340] Tr. at 62 line 25.
[341] RCA Br. at 47-48 [R. 033937 to 033938].
[342] In fact, in this matter, GHU/CUC requested interim rates *lower* than the requested final rates. Particularly in situations where the RCA might not follow its own precedent, utilities face a risk that the RCA will reject requested final rate increases unexpectedly, triggering unexpected refunds. This possibility actually provides an incentive to ask for *lower* rates in the interim than what utilities believe they should receive. *See AVCG* at 286 (stating that "[p]ast decisions provide regulated entities with notice of the agency's expectations").
[343] *See*, eg., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983) (stating that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action" because "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

explanations demonstrate why agencies are required to make factual findings and provide explanations for a decision in the decision itself.[344] When an agency issues a decision that includes findings, conclusions, and the bases for them, it avoids potentially unnecessary appeals of opaque agency decisions where neither the parties nor a reviewing court are able to discern the reasons for an agency decision for purposes of review, and the decision must be remanded.[345]

6. GHU/CUC did not waive their arguments regarding the "escrow or 10.5 percent interest" requirement.

In briefing before the superior court, the RCA's primary argument against remand (accepted by the superior court in its decision) was that GHU/CUC failed to waive the issue by not raising it before the RCA, and that GHU/CUC should have at least stated that they were electing interest "under protest." However, GHU/CUC did not waive their argument before the RCA, because they raised the issue of what conditions should be put on interim rates by requesting that they be refundable. Further, while the general rule is that an appellate court "will not consider arguments never raised before the trial court" applies to "arguments never presented to an agency whose decision is appealed,"[346] the application of that rule presupposes an opportunity to present objections to the agency before a decision is rendered by that agency."[347] Here, besides the initial tariff advice filing that GHU/CUC

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[344] *Id.*
[345] *Se. Alaska Conservation Council, Inc.,* 665 P.2d at 549 noting that a "decisional document, done carefully and in good faith, serves several salutary purposes," including "facilitating judicial review").
[346] *Amerada Hess*, 711 P.2d at 1181.
[347] *Id.*

made, there was no opportunity for additional filings before Order 1 was issued.[348] Further, to the extent that this Court may deem that waiver occurred, the "escrow or interest at 10.5 percent" requirement constitutes plain error, for the reasons stated above.[349]

The RCA's decision regarding whether refunds are subject to interest and escrow should be vacated and remanded to the RCA for further proceedings consistent with this Court's holdings regarding the issues raised herein.

CONCLUSION

For all the foregoing reasons, GHU-CUC respectfully requests that the Court vacate, reverse and remand Order Nos. 1, 21 and 26 with instructions that the RCA make new determinations on ROE, plant additions, consumption adjustment, and interest as may apply to refunds, if any are due, as is described more fully above.

[348] In fact, another utility recently responded to a similar RCA order with an "escrow or 10.5 percent interest" requirement, stating in its filing that the RCA should conduct a decisionmaking process to determine the interest rate. Order No. U-22-078(5). The RCA responded by deeming the response to be an election to use escrow. *Id.* at 6. The RCA also refused to accept the utility's alternative election request that if the RCA would not conduct a process to determine interest, that it would consider the utility's filing an acceptance of the 10.5% interest rate option, but under protest, in order to preserve the issue for appeal. *Id.* at 4-5. The RCA stated that the option that would allow for clear preservation of the right to appeal was "not acceptable," because it could result in "unnecessary delay in payment of refunds." *Id.* at 5-6.

[349] *Lucy J. v. State, Dep't of Health & Soc. Servs., Off. Of Children's Servs.,* 244 P.3d 1099, 1118 (Alaska 2010).